

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

3

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof, Appellants,
vs.

INTER-ISLAND STEAM NAVIGATION
COMPANY, LIMITED, an Hawaiian Cor-
poration, Owner of the Steamers "HEL-
ENE," "MIKAHALA," "LIKELIKE," and
"MAUNA KEA," for Itself, the Officers and
Crews of said Steamers and other Servants
of Said Owners, Appellee.

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof, Appellants,
vs.

MILLER SALVAGE COMPANY, LIMIT-
ED, a Corporation, Appellee.

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof, Appellants,
vs.

MATSON NAVIGATION COMPANY, a
California Corporation, Owner of the Tug
"INTREPID," for Itself and the Officers
and Crew of Said Tug, Appellee.

BRIEF FOR APPELLEES

INTER-ISLAND STEAM NAVIGATION CO. LTD., and MATSON NAVIGATION CO.

W. O. SMITH,
L. J. WARREN,
CHARLES P. EELLS,
W. H. ORRICK,

Proctors for said Appellees.

Filed the day of November, 1914.

F. D. MONCKTON, *Clerk.*

By..... Deputy Clerk.

INDEX

	Pages.
STATEMENT OF THE CASE	2
Claims of the Matson Navigation Co.....	4
Claims of the Inter-Island Steam Navigation Co.....	4
Claims of the Celtic Chief	5
Description of the Celtic Chief	6
ARGUMENT	6
Danger to the Ship	7
The Reef (Kind)	7
The Reef (Bottom Contour)	8
Weather Conditions	8
Condition of the Sea	10
Direction of Swell	11
Height of Swell	11
Force of Swell	14
Frequency of Swell	14
Effect on the Ship	15
Current	22, 29
Danger of Going Broadside	24
The Ship "Moving In"	30
Danger to the Cargo	33
THE CASE FOR THE "INTREPID"	35
Getting on the Line	35
Pulling by the Intrepid	37
Danger to the Intrepid	42
Cutting of the Intrepid's Line	43
Standing By	49
OPERATIONS OF THE INTER-ISLAND COMPANY	50
Promptitude	50
Lightering	51
The Ship's Winch	53
The Donkey-barge	54
Danger With Small Boats	55, 63
Danger to Men	63
Depth of Water	59
Sling Work	63
Night Work	65
Operations of Steamers	68
Mauna Kea	68

	Pages.
Mikahala	73
Helene	78
Likelike	94
Combined Pulling Wednesday Night	96
Lack of Knowledge of Certain Witnesses	96
Weight of Towing Vessels as Factor	103
Jerking	104
“Five-Ton Block” Theory	106
Effective Horse-Powers	106
A “Straight” Line	110
Danger to Steamers	111
Summary	114
Competency and System	114
Lightering	115
Arcona Interference	116
Signals	116
Floating of the Ship	117
Mikahala’s Work	117
Standing By	119
OPERATIONS OF THE “ARCONA”	121
Appellant’s Contentions	121
Attitude of Arcona’s Commander	123
First Going Out to Ship	126
Afternoon’s Maneuvers	126
Final Position Taken	131
“Testing” Her Wires	133
Efforts With Big Hawser	134
Two Wires Finally Run	138
Evening Operations	140
Alleged Pulling, Ship’s Witnesses	142
Alleged Pulling, Libellants’ Witnesses	147
Did Not Use Propellers	161
Did Not Heave on Anchor	163
Maximum Power Possible	172
Did Not Intend to Pull That Night	175
Towing the Ship to Sea	178
Casting Off at Sea	179
Confusion, Lack of Skill and Seamanship	187
OPERATIONS OF THE MILLER SALVAGE COMPANY	188
Detrimental Work	188
Lightering	189
Anchor Operations	190

	Pages.
Delay	190
Misplacement	191
Rigging of Tackle	192
Limitations on Tackle Power	192
Strength of Line	198
Weight of Anchor	198
Holding Power	198
Value of Equipment	199
INACTIVITY ON SHIP'S PART	200
Warning Unheeded Before Stranding	201
Ship's Crew No Aid	202
SUCCESS.	
How the Ship Came Off	182
Ship and Cargo Saved Without Material Injury	203
The Effective Service	204
Opinion of Macaulay	205
Opinion of Haglund	206
CREDIBILITY OF WITNESSES	206
Schraeder	207
Connemann	209
Henry	209
Macaulay	211
Clarke	212
Haglund	212
Piltz	213
AMOUNT OF AWARD	213
Basis of, By Trial Court	213
"Lighterage" and "Towage" Basis	214
Argument for Encouragement	216
Precedents	218
The <i>Hesper</i>	220
The <i>Manchuria</i>	224
The <i>Loch Garve</i>	226
Penalty of Costs	229
Inter-Island and Matson Awards	231
Separate Allowance of Extra Expense	232
Notes in Reply	232

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

The British Ship "CELTIC CHIEF," her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof,

Appellants,

vs.

INTER-ISLAND STEAM NAVIGATION
COMPANY, LIMITED, an Hawaiian Cor-
poration, Owner of the Steamers "HEL-
ENE," "MIKAHALA," "LIKELIKE," and
"MAUNA KEA," for Itself, the Officers and
Crews of said Steamers and other Servants
of Said Owners,

Appellee.

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof,

Appellants,

vs.

MILLER SALVAGE COMPANY, LIMIT-
ED, a Corporation,

Appellee.

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof,

Appellants,

vs.

MATSON NAVIGATION COMPANY, a
California Corporation, Owner of the Tug
"INTREPID," for Itself and the Officers
and Crew of Said Tug,

Appellee.

No. 2426

BRIEF FOR APPELLEES, INTER-ISLAND
STEAM NAVIGATION COMPANY, LIM-
ITED, AND MATSON NAVIGATION
COMPANY, LIMITED.

STATEMENT OF THE CASE.

The British Ship "Celtic Chief" (for which we will hereafter use the term "Ship"), on a voyage from Hamburg laden with a cargo of fertilizer and a small quantity of marbles and liquor, arrived off Honolulu on the evening of Sunday, December 5th, 1909, and went ashore late that night upon the reef between Kalihi Bay and Quarantine Island. The causes and manner of her stranding will appear from the evidence as cited in this brief when pertinent to any point under discussion.

The further facts of the case, relating to the salving of the vessel and cargo, are more or less in dispute between the parties. Each salvor claims to have been the principal agency in the salving, and on the other hand the libellee claims that the German cruiser "Arcona" did the most work.*

The several causes come before this Court upon the consolidated appeals of the libellee, alleging that the awards of salvage made to the respective salvors, as stated in the judgment of the Court, are excessive.

* At the end of this brief we have noted briefly a few of the more material points where we would differ from Appellants' statement of the case.

We are, ourselves, of the opinion that in view of the accepted finding of the trial Court that the aggregate value of the salved property was \$134,559 (Tr., p. 3372), the allowance of a total salvage award of \$30,000 was not excessive. This included an allowance for interest at six per cent for the three and one-half years which had elapsed since the services were rendered. (Tr., p. 3373.)

If the allowance of \$30,000 as salvage to all of the salvors collectively be regarded as fair, the Court will further go into the matter of its apportionment between the respective salvors. This involves directly the relative value of the services performed by each. It is the contention of the Inter-Island Steam Navigation Company and the Matson Navigation Company that if the apportionment of the aggregate award is to be reopened, no allowance whatever should have been or be made for the services of the German cruiser "Arcona" and that too large an allowance, \$8,000.00, was made to the Miller Salvage Company. That the work of the Miller Salvage Company did not at best entitle it to an award of more than a nominal sum, and that the larger part of the award heretofore allowed the Miller Salvage Company plus the \$500 credited to the "Arcona," should have been and should be fairly apportioned between and added to the amounts allowed the Inter-Island Company and the Matson Navigation Company.

CLAIMS OF THE MATSON NAVIGATION COMPANY.

In brief, it is the claim of the Matson Navigation Company, owner of the steam tug "Intrepid" that this tug (aside from a gasoline launch), was the first vessel to put a line on the Ship, at a time which was without question the most critical after she was once on the reef, and that the service rendered by the Intrepid during the several hours from the time she took hold, and until other assistance arrived and made assurance doubly sure, undoubtedly saved the Ship from going broadside on the reef, the fact being uncontrovertible that had she gone broadside the salving of her would have been far more difficult if not impossible. Alone, the Intrepid was unable to pull the ship from the reef, although able to hold her stern up against the action of the swell and to better the condition of the Ship. The Intrepid further remained and pulled on the Ship, in conjunction with the other agencies, until cut loose to meet a condition imposed by the commander of the German cruiser "Arcona."

CLAIMS OF THE INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED.

It is the claim on the part of the Libellant, the Inter-Island Steam Navigation Company, Limited, that through its hazardous lightering operations, and those of the Miller Salvage Company, Limited, far less hazardous, and the pulling on the Ship by the Inter-Island

steamers, aided in some degree by an anchor placed astern by the Miller Salvage Company, and the rising of the tide, the Ship was floated without serious damage to either Ship or cargo. It is the further claim of all the Libellants in the consolidated cases, that the cruiser "Arcona" did not have any effective part whatever in the salving of the Ship.

THE CLAIMS OF THE SHIP.

As is often the case when a government vessel has been present at salving operations, the claim is made that the greatest service was rendered by the government vessel, obviously because of a desire to have as large a part of the award as possible credited to the agency which will take no salvage, thus reducing as far as possible the credit to the agencies to whom real compensation must be made.

It is likewise claimed by the libellee that the Ship was not in any danger and was comfortable enough; that she was within easy reach of assistance; that an unlimited amount of assistance could have been had; and that it would have been only a matter of time before, by some simple operations, the Ship would have come off, herself and her cargo intact.

It will be observed, of course, that the libels of the Inter-Island Steam Navigation Company and Matson Navigation Company are filed on their own behalf and that of their respective officers and crews and other servants.

In this brief the numbers in parentheses refer to the page numbers of the printed transcript. In some instances the names of the witnesses are also given, as we believe that sooner or later, in considering the credibility of witnesses, the Court will attach more or less value to such references.

As a description of the conditions bearing upon the situation of this vessel ashore will aid an understanding of portions of testimony which will be cited throughout the case, as well as indicate the danger to the Ship and her cargo, we will present these features of the case preliminarily.

A detailed description of the Ship appears in the decision of the trial Judge, on page 3372 of the transcript. In addition to this we mention that her floating draft, when laden to water line, as she was on this voyage, was 21 feet aft and 20 feet 10 inches forward (Henry, Tr., p. 251; Macaulay, Tr., p. 2195).

ARGUMENT.

There being three separate assignments of errors, by reason of the separate decrees entered in the Court below, it will not be expedient to attempt to discuss them separately. As to some of them a consideration of the whole record will be necessary, while others will be referred to more or less out of their sequence.

DANGER TO THE STRANDED VESSEL AND CARGO.

As against the specification of error (No. 2 in each case), that there was little or no danger to the stranded property, we present the following descriptions of the reef on which the vessel was aground, the conditions of the weather and sea, and their effect on the vessel:

THE REEF: (Kind)

Capt. Henry: "Soft coral and sand." (Henry Depn., Tr., p. 143).

Capt. Macaulay: "Sand and coral. Big patch of sand, then a hummock of coral sticking out here and there in patches, all in that neighborhood" (Tr., p. 2202). "Boulders of coral" (Tr., p. 2395). "Knew it was coral because coral when crushed discolors the water, making a milky surface" (Tr., p. 2202).

Capt. Miller: "Coral and lava rocks" (Tr., p. 1403).

Capt. Piltz: "A hard coral bottom" (Tr., p. 1953). "Indicated as hard because the water was milky" (Tr., p. 1953).

Capt. Nelson: "White water indicates that coral is being ground up" (Tr., p. 2788).

Capt. Haglund: "Judged it was coral being ground up on account of the milky color" (Tr., p. 2908).

Lowry: Judged the bottom to be sand and soft coral because the tallow on his lead line brought up some sand and "small flakes of coral rock" (Tr., p. 281). We would say that might indicate some *loose* coral—but why "soft?"

Lonche: "Hard coral rock" (Tr., p. 530). "Sand and black rocks in it" (Tr., p. 550).

Bray: "Pretty hard kind of coral" (Tr., p. 722).

Weisbarth: "Few little boulders here and there" (Tr., p. 656).

THE REEF: (Bottom Contour):

Lonche: "Pretty level, generally running up, an incline" (Tr., p. 550).

Weisbarth: "Fairly level, a gradual grade" (Tr., p. 657).

Macaulay: "The ship was on the outer edge of the reef. In that locality the reef runs in ledges. The outer ledge rises abruptly, then goes on a plane with very little grade, say, for 1000 feet, then comes to another little ledge of coral from 2 to 4 feet high, then that runs on a plane" (Tr., pp. 1533-4).

We think the Court will be justified in finding the reef to be a dangerous one, precisely as was found in the case of the *Chiusa Maru*, reported in 3 U. S. Dist. Ct. Rep. 361, as the decision there indicates that the testimony was much the same, and the fact being that the two vessels went ashore at points very near each other, and several of the same persons have testified as witnesses in both cases.

Weather Conditions:

The time of the stranding was in December, practically the very middle of the season in which southerly storms are liable to come. Referring to the case of the "*Chiusa Maru*" and the summary of the evidence and finding of this Court with respect to weather conditions and the consequent danger, we think that a case of considerably greater danger to libellee is made out in the cause at hand, as the swell in the present case was apparently greater, and the weather was not only in the season of southerly storms but the weather was

southerly at the time. Quoting from the decision in the Chiusa Maru, found on page 361 of Vol. 3 of the decisions of this Court, we think our case comes squarely within the same judicial knowledge of the Court:

“It is in the testimony that at the time of year at which she stranded, winds from the south, southwest and southeast are liable to occur and that in such weather she would be on a lea shore exposed to the open sea. *It is a matter of general knowledge in these islands that such is the case and the Court does not hesitate to take judicial knowledge of this fact.* Vessels have been driven ashore on the reef near the harbor at different times by southerly gales and totally wrecked. *Such storms are liable at any time from the 1st of October to the last of March,* and with such weather coming on, salvage operations would have quickly become impossible, and it would have taken but a few hours to have entirely wrecked the libellee.” (Italics ours.)

The Chiusa Maru stranded very near the harbor, as did the Celtic Chief. In the former case the weather was not *bad*, any more than in the case at bar, and there was even less danger of it in that case than here because here the weather was largely southerly.

Looking to the testimony in the case before us, it appears that the weather Sunday evening, and until toward morning was showing signs of change, and the wind was variable. From a fair N. E. breeze at 7 p. m. Sunday (Macaulay, Tr., p. 2178), the barometer then being low (Tr., p. 2178), the wind died to a calm by 9 or 10 p. m. (Tr., pp. 2181, 2382, 2204), and a southerly swell began to come in (Tr., pp. 2181, 2204). By 2 a. m. Monday a land breeze sprang up (Tr., pp.

2181, 2381, 2205), but died again to a flat calm (Tr., p. 2183). Thereafter, by the weight of the testimony, the weather was southerly, and only one who has lived in Honolulu a number of years knows what southerly or "Kona" weather is. For references to southerly weather, see Henry, Tr., pp. 165, 203; Lowry, Tr., pp. 276-7, 172; Brisco, Tr., p. 329; McAllister, Tr., pp. 82, 91; Piltz, Tr., p. 1859; Haglund, Tr., p. 2958. A "Kona" prognosticated (Miller, Tr., p. 1405). It was sultry Wednesday night: "typical Southerly weather" (Lewis, Tr., p. 3237).

In the testimony the Ship's witnesses generally say the "weather was good,—or fine." We take it that to a seaman this is a comparative term,—say as distinguished from rainy or stormy weather.

Capt. Macaulay said:

"The danger was that the stranded Ship was inside the line of breakers, and the month was the month of December, liable for a heavy sea to run in there at any time" (Tr., p. 2284).

Comparing the Hamakua Coast with the place where the Celtic Chief was stranded, he said:

"Along the Hamakua Coast is very deep water and there are no sudden breakers coming in in deep water. When the weather changes on the Hamakua Coast it always gives you warning, but there is no warning given to you when you are inside the breakers on the reef on the lee side of the Island of Oahu. There is no warning" (Tr., p. 2286).

The Condition of the Sea:

A Southerly swell began coming in after midnight Sunday night (Macaulay, Tr., pp. 2382, 2404). This

began with a little swell (Tr., p. 2381) which attained greater force toward morning, and continued thereafter, varying in force during the salving operations (Tr., pp. 2383, 2405, 2286), at times considerable (Tr., p. 2382). In Capt. Macaulay's words,

"All the time the Ship was on the reef there was no day that it continued the same (Tr., p. 2381).

The direction of the swell, beginning with the time the Tug Intrepid took hold, was almost astern of the Ship but striking her a little on the starboard quarter (Weisbarth, Tr., p. 654; Kennedy, Tr., p. 748; Miller, Tr., p. 1404; Piltz, Tr., p. 1762; Nelson, Tr., pp. 2776, 2815; Macaulay, Tr., 2196.

The height of the swell varied:

Lonche: "Swell are never the same size" (Tr., p. 448). An ordinary or moderate swell is 3 to $3\frac{1}{2}$ feet (Tr., pp. 445-6). On Monday morning it was 3 or $3\frac{1}{2}$ feet (Tr., p. 445). They splashed on the Ship's counter (Tr., pp. 447-8).

Watkins: (Ship's agent): Admitted there was quite a heavy swell (Tr., p. 3293).

Mason: A pretty heavy sea running Monday (Tr., pp. 906, 925).

Clarke: 6 feet high (Tr., p. 1060), and 8 to 10 feet (Tr., p. 1061).

Miller: A pretty heavy sea (Tr., p. 1403). 4 feet below and 4 feet above, or an 8-foot range, makes a "four-foot swell" (Tr., p. 1430).

It was high enough to *break* at the bow of the Ship: (Mason, Tr., p. 926; Clarke, Tr., p. 1060; Miller, Tr., p. 1428; Piltz, Tr., pp. 2010-11; Tullett, Tr., pp. 2679, 2727. And once, at *least*, a big swell broke abreast of the forehatch (Tullett, Tr., pp. 2679, 2727), and this

one was about 16 feet high (Tr., p. 2679). Others Tullett saw were from 12 to 14 feet high (Tr., p. 2679).

Capt. Piltz says that the "mean height" was 5 or 6 feet when the Mikahala went out there Monday morning (Tr., p. 1762); and during the lightering on Tuesday the boats rose 8 to 10 or 12 feet (Tr., pp. 1927, 1865-66, 1867, 1957). On Wednesday a little less,—8 to ten feet,—(equal to 4 or 5 "mean") (Tr., pp. 1865-66); and 4 to 6 feet mean (or 8 to 12 extreme range) on Monday (Tr., pp. 1866-67). See also that he said 6 to 12 (extreme) or 3 to 6 (mean) on Wednesday (Tr., p. 1957). And again 6 or 7 (mean) on Wednesday (Tr., p. 1957).

Capt. Haglund says the biggest were say 14 or 15 feet (Tr., p. 2959).

Capt. Tullett says that a swell is as high, *when it breaks*, as the water is deep at point of breaking, and that there is no other way to measure a swell (Tr., pp. 2678-79). Note also that although Tullett did not know the depth of the water at the Ship's bow (Tr., p. 2679), his estimate of the height of the swell that broke abreast of the forehatch, 16 feet, tallies with the actual depth of the water there (Tr., pp. 2192-3, 2196).

Piltz and Miller take the mean or medium between the highest and lowest extremes of the top and dip of the swell, as expressing its height. They say that a difference of 10 or 12 feet between the extremes would be a 5 or 6 foot swell (Piltz, Tr., p. 1762; Miller, Tr., pp. 1429-31).

Captain Macaulay said the swells were not over eight

feet above the *surface* on Monday (Tr., p. 2203), and "8 feet is a pretty good swell" (Tr., p. 2285). He also said "quite a nasty swell" (Tr., p. 2198). Capt. Macaulay does not count the *trough* of a swell, but only above the surface or mean sea level (Tr., pp. 2451-2).

We note, in passing, that a boat before rising on a swell, drops into the trough before and after it.

Capt. Nelson says the swells averaged 8 feet (Tr., p. 2776), and some may have been 10 or 12 feet (Tr., pp. 2776, 2816).

Capt. Henry admitted that the swell was on all day (Henry, Tr., p. 205).

Most convincing, perhaps, is the photograph, Libellant's Exhibit K, taken by Capt. Tullett Wednesday afternoon (Tr., pp. 2688-90), where by judging of the height of the vessel, which was 20 feet above the sea (Tr., p. 2688) and using parallel rulers, it was apparently 12 feet (Tr., p. 2688), which Tullett says was an average,—some larger, some smaller,—(Tr., pp. 2688, 2697-99), some perhaps 4 feet higher (Tr., p. 2689). Looking at this same photograph, Capt. Haglund estimated the height of the swell there shown at about 10 feet or a little more, giving the width of the Ship's plates and the band of white paint and the black bulwark which he knew (Tr., p. 2960).

Appellant's counsel have heretofore claimed that *Monday* was by far the roughest day of the operations. That very claim goes to accentuate the danger the Ship and cargo were in on Monday, when the *Intrepid* and *Mauna Kea* did their real work. These photographs

show, according to counsel, a lesser swell than on Monday.

The force of the swells also varied from time to time, but an idea of them will appear from the following references:

The largest swells, at least, would heave the Ship's stern up, and unquestionably the swells were the only force to cause the inward movement of the Ship on the reef. (See Lonche, Tr., p. 443; Miller, Tr., pp. 1404-5).

The swells broke 6-inch lines, bitts, rails, etc., of Miller's lightering vessels (Tr., pp. 571-2, 642, 1424, 1429-30; Henry, p. 203; Brisco, pp. 348-9).

Capt. Henry admits that Miller's lighters "jumped" around (Henry, Tr., p. 204) and had a rise and fall of 7 or 8 feet (Henry, Tr., p. 204).

And it is too evident to require any argument that if barges and vessels as large as the Concord and Kaimiloa had a rise and fall of that much, the swell itself, to move *them*, had a bigger range.

Lowry also admitted that Miller's barges "ranged" about on the swells (Lowry, Tr., pp. 276-7).

The Inter-Island boats engaged in lightering rose from 12 to 15 feet (Tullett, Tr., p. 2674).

See also, Tullett, Tr., p. 2692; and Piltz, Tr., pp. 1863-4.

In frequency of the larger swells, the testimony varies somewhat, depending, it is only fair to say, upon the idea of each individual witness as to what were the "big" swells. Capt. Haglund says: 3 to 4 and 5 minutes

apart (Tr., pp. 2960-61): Mr. Kennedy said: two or three at a time,—a long and a short (Tr., p. 748).

Mason: "three big seas" every 15 or 20 minutes (Tr., p. 906).

Lowry: "about every 20 minutes or so" (Lowry, Tr., p. 282).

Brisco: said the Ship would bump five or six times in a day (Brisco, Tr., pp. 330, 342).

Capt. Macaulay said

"there was times when the swell came in heavier than other times; there would be a smooth spell of it; then without any warning there would be three heavier swells coming in, much heavier than the average swell during the day" (Tr., p. 2203).

And again:

"The sea may be perfectly smooth. All at once, and all of a sudden a roller comes in there and curls over and breaks, and if you're close to that breaker you're going to get capsized" (Tr., p. 2286). And see Tr., p. 2451.

It is respectfully submitted that notwithstanding the claim of the Ship in this case that the sea was smooth and there was no appreciable swell, the evidence very greatly preponderates that there was, in the opinion of quite a number of masters of long experience in the Hawaiian Islands, a considerable swell, and that in no other way could the lines of Miller's vessels have been broken. We will proceed, however, to indicate further the evidence tending to show the danger to the Ship and cargo.

The Effect of the Swell upon the Ship, aside from the tendency to put her further ashore, was to make her rise and fall, pounding, bumping and "working" with

more or less severity, depending perhaps on the variance from time to time in the swell and the tides, and possibly by the lightering operations. We make the following references to testimony of this kind:

“Working” Lonche, Tr., pp. 443, 448).

“Not as pleasing as an earthquake” (Kennedy, Tr., p. 747).

“Severe bumps on Monday” (Kennedy, Tr. p. 818).

“She was pounding up and down, pretty hard” * * * and “pretty often” on Monday (Mason, Tr. pp. 905, 907).

“Thumping” (Miller, Tr., p. 1614; Piltz, Tr., p. 2057).

“Her rise and fall was a good three feet” (Miller, Tr., p. 1618).

“Swaying and pounding” one or two feet aft (Piltz, Tr., p. 1763).

“It wasn’t a very pleasant sensation. We were in fear”—etc. (Piltz, Tr., pp. 2056-7).

“She’d start to go on her keel and then she’d roll (mostly, on her port side) * * * and grind” (Piltz, Tr., p. 2057).

“Sort of a shock” (Dowsett, Tr., p. 2153).

“Rolling; grinding; thumping” (Haglund, Tr., p. 2959).

“Pounding upon the reef rather hard” (Schroeder, Tr., p. 384).

Capt. Macaulay’s testimony shows the peculiarity of the effect on the vessel and the difficulty in determining *just how* she acted. On pages 2209-10 Transcript is an incomplete report of his description. We say incomplete because a clear recollection supported also by private trial notes satisfy us the reporter missed a clause

which we will insert in brackets in our quotation below. He said:

“Well, when a heavy sea would come and strike the Ship, she would naturally rise and bump, and shake her masts and rigging and her whole hull would tremble for the time being and then she would settle down to normal.

“Q. Where on the Ship would this motion be most severe?

“A. All over the Ship; in fact I had an idea that she was striking heavier forward than she was aft and I went forward on the bow of the Ship to find out where she was striking, (and from there she seemed to be striking hardest aft). It is a pretty hard matter to locate the exact spot where she strikes the severest”—etc.

Even Captain Henry, who said that “at times” there was no swell at all (Tr., p. 163), had to admit that “two or three times she *did bump hard*” (Tr., p. 260). And Lowry admitted “bumping” (Tr., pp. 282, 287); and Brisco testified to bumping pretty hard (Brisco, Tr., pp. 330-31), and that “on Monday and Tuesday there was heavy bumping” (Tr., p. 337), and you could recognize a bump “because the whole Ship shook” (Tr., p. 347).

Capt. Schroeder is the only witness who has said that on Tuesday morning the Ship was harder aground at her stern than her bow, her stern being fast and her bow swinging from side to side with the swells (Tr., pp. 384, 391), and we submit that when he answered direct interrogatory 11 by saying that Capt. Henry told him the Ship’s draft (in deep water) was 24 feet aft and 20 feet forward (in which he was mistaken), it is

only fair to think that he had this information in mind when he said she was on harder aft, because, as indicated by his further answer to cross interrogatory 9, (Tr., p. 391), she would then have to be one meter (39 inches) deep in the reef itself.

And even Capt. Schroeder, were his testimony correct that she was harder on aft than forward, said that on his first examination on Tuesday morning he could hear "the noise of the iron bottom scraping over the corals * * * in the aft part" (Tr., p. 384). It follows from *this*, also, that if her *stern* was on hardest, and her *stern* were scraping along the bottom, she was not so hard on the reef that she wouldn't have turned broadside on Tuesday morning had she not been held.

Ideas differed as to whether or not the Ship "worked a bed in the coral." It is the idea of Ship's counsel that the vessel was merely on a sort of marine railway for the time being, in an easy bed of "soft" coral and sand (Tr., p. 2474). As to *sand*, the testimony shows there is a reef of coral the outer ledge of which rises out of deep water, and also that *on this* was some "sand," which sand, by the evidence, is merely ground-up coral. The holes and swales of the reef were doubtless filled with this sort of sand, (as the Court found with respect to this same reef in the Chiusa Maru case). Even sand alone might be "soft" for a ship's keel but hard for her bottom to pound upon, as water is "soft" for a dive into but "hard" for broadside entry. And the *coral* has a "certain limit to its softness," although "soft" enough

to be cut by a sharp keel was hard enough to pierce or force a ship's bottom (Macaulay, Tr., pp. 2474-5).

Witness Miller says "There was no bed worked in that reef (Tr., p. 1449). He didn't "understand that a ship's keel being in the coral is a bed for the ship. A bed for the ship would take her all in say for three or for feet up on her bilges" (Miller, Tr., p. 1619).

Piltz thought that with the Ship working as described on pages 2059, Transcript, "she would naturally kind of imbed herself with the loose coral that she would stir up, caused from the water, forming generally on the seaward side of the vessel" (Piltz, Tr., p. 2059). And if she were in that kind of a bed (broadside) it would be harder to get her off (Tr., pp. 2059-60).

Lowry thought the Ship must have worked into a bed "and seemed to be stuck pretty hard" (Tr., p. 287).

Macaulay thought the Ship's keel was imbedded about 6 inches (Tr., pp. 2345, 2389), and Miller put at from 8 to 12 inches (Tr., pp. 1618-19).

In any case she was grinding the coral, because the lime escaping from newly crushed coral is what makes the water white or "milky" (Lonche, Tr., p. 549; Haglund, Tr., p. 2908; Macaulay, Tr., pp. 2202-3; Nelson, Tr., p. 2788).

From all of the foregoing conditions affecting the Ship, taken also in connection with her manner of going ashore and her movements before assistance arrived, as below indicated, we urged upon the Court that she was in a position of very grave peril to herself and her cargo.

She is a single bottom ship (Tr., pp. 1432, 1618), and in view of the fact that she was working, grinding and continuously affected by the swell, the danger was imminent that she would go broadside, and, once broadside, she would probably have been doomed to stay there and break up. (See *Chiusa Maru case, supra*, p. 5). *How soon* she would have gone broadside "no living man could tell."

Let us here go back to the testimony of how the Ship *got on* in the first place, and her turnings and changes of position and how caused, until help arrived, as indicating her tendency of motion under the action of the swell. During the night she was in different positions (Tr., p. 2187). As to this we have the testimony of practically only one witness, although on certain points it is supplemented by others.

Passing, for the present, the testimony on pages 2174 to 2177, Transcript, as to how the Ship was actually handled, or should have been handled in the opinion of Capt. Macaulay, we find that when an anchor was finally dropped the Ship was "partly on the reef" heading to the northeast, her head being "right up in the reef," at which place the reef tended say 45° , forming a little curve, the general trend of the reef being east and west (Tr., pp. 2179, 2187), so that the Ship was "angling quarterly on to the reef" (Tr., p. 2179). By "partly on the reef" (Tr., p. 2179), Capt. Macaulay meant, apparently, vertically *over* the edge of the *ledge*, although not yet touching (see Tr., p. 2180, showing the depth then to be 26 feet, showing she was not in the deep water

which exists off the ledge), because he follows the statement on page 2179, Transcript, with the further recital that after the port anchor was dropped the starboard anchor was cleared and also let go and the Ship rode to her anchors and they hoped the breeze would keep up and she would not (actually) touch, although dangerously close (Tr., p. 2180). But a few minutes afterwards her *keel* did touch slightly several times (Tr., pp. 2180-81). It was about 9 p. m. on Sunday night that she first touched (Tr., p. 2180). Then the wind died down and a light southerly swell began soon after to come in *and inclined her in toward the reef, broadside, with her stern to the westward and her bow to the eastward* (Tr., p. 2181). Her position when she first touched is marked "C. C. I" on the sketch made by Capt. Macaulay (see Tr., p. 2188), on file as Libellant's Exhibit F (Tr., p. 2200). "Position 1" is again described on page 2188, Transcript, as "heading northeast, her stern southwest" and "the reef running east to west." In this position, and on account of the tendency to broadside, Capt. Macaulay advised taking up the port anchor, which was lying on the *reef* in 26 feet of water (Tr., p. 2180), for fear that it would pierce her bottom should she be driven over it, and this was done (Tr., p. 2181). The effort to take advantage of the land breeze failed and the Ship got back to about the same position (Tr., pp. 2180-83, 2188).

It is difficult to conceive what could have put her back again if not the incoming swell.

Under the same conditions, and with the current running to westward at a speed of from one to three knots (Tr., p. 2183), she was touching bottom again, but only occasionally, and not hard (Tr., p. 2184), and gradually "she was almost broadside on the reef," just on the outer edge (Tr., p. 2184), having worked around, her *bow* swinging from the east to (toward) the north until she got in position No. 2 (Tr., p. 2191), shown on Exhibit F, along toward daylight (Tr., p. 2184), which was her position when the Intrepid arrived at about 6:30 Monday morning (Tr., p. 2189). She moved this way "on account of the current and swells," the current striking her on the starboard side, the swell more quarterly than the current (Tr., p. 2192).

It will be seen by reference to the witness' answer on page 2192, Transcript ("Well, the Intrepid having hold of her") that the witness had carried his preceding answers as to the swell up to and past the point when the Intrepid took hold,—the swells and current doubtless continuing more or less the same. When directed back to her movement *prior* to the time the Intrepid took hold (Tr., p. 2192), he describes the same tendency of the elements, saying that they affected her *bow*, inclining her *bow* toward the north, but her starboard anchor being out she didn't move that way very *much*. Asked, then, what held her *stern* from going around, tending to throw the vessel broadside, his answer was that the *reef* held her *stern* (Tr., p. 2192).

Ship's counsel have tried to confuse Captain Macaulay and discredit his testimony by assuming, on cross

examination, that *because* he had testified on direct examination that the reason why the Celtic Chief was not thrown broadside on the reef before the Intrepid arrived was because her *bow* was held by her starboard anchor,—*therefore*, in moving from position 1 to position 2 her *stern* must have *swung around to the eastward*, up against the swell. (See Tr., pp. 2398-9). The witness' apparent affirmative answer to that idea, on page 2398, Transcript, must be taken with those on page 2399, Transcript, from which it is clear that in saying her stern was more eastward he meant, *not* that the stern *moved against* or *into* the swell, but that her *bow* had *swung to the westward* (Tr., pp. 2398-9) and, "naturally the *line of the Ship* changed and took position number two" (Tr., p. 2399); and he said, specifically, "I don't believe that her *stern* moved to the *eastward* any, but the end of her *bow*, swinging to the *westward*, *altered the bearing of the stern*" (Tr., pp. 2387-8, 2399). Plainly he meant that only the *point of direction* of the stern had changed, without the stern itself moving except by turning as caused by the bow swinging to west, the stern, on account of being deeper in the water (Tr., p. 2379), being "*up against the reef*" (Tr., pp. 2379, 2387-8) was held, while the bow, drawing less water, could move *westward* gradually (Tr., pp. 2195-6, 2387-8).

We here call attention to the further testimony of Captain Macaulay that her starboard anchor checked her somewhat from going broadside (Tr., pp. 2195, 2388); it "checked her some" (Tr., p. 2198), and "kept

her to a certain extent" (Tr., p. 2380); but she was, nevertheless, "gradually swinging her bow to the nor'ward and inclined to go farther in on the reef" (Tr., p. 2198), and (as to her stern) "the whole body of the Ship was going in farther on the reef gradually and swinging gradually to the nor'ward before the Intrepid and the Hukihuki arrived" (Tr., p. 2198); and, notwithstanding her stern was *against* and more or less then held by the reef, he said "*I fully believe she was gradually canting her stern towards the reef from the moment she stranded until assistance came from shore;*" nor did the Captain wish to redraw his diagram (Tr., p. 2397). "The Ship was never stationary until she pulled her last position" (Tr., p. 2461).

Being in position 2 when the Intrepid (and Huki) took hold at about daylight in the morning (Tr., p. 2193), Capt. Macaulay thought it would be a large advantage to get the Ship at right angles to the reef to take the sea and swell right astern as far as possible, so the starboard anchor was taken up which allowed her bow to swing further west and she assumed position 3, which was about N. 10° W. (Tr., p. 2193), which was her position thereafter, so far as *direction* is concerned. She had then moved further directly in on the reef until she was on full length with her *bow* harder on than her stern. (See Tr., pp. 475, 550, 862-3, 1451, 1615-16, 1763-4).

The gravest danger to any ship ashore is that of going broadside on the reef. The fact that this Ship *didn't* go broadside, does not mean she was not in grave *dan-*

ger of it; and danger of this kind has the element of uncertainty which makes it imperative to have immediate relief, and no man can say that she would *not* have gone any more than that she would, in any given space of time. Again the *Chiusa Maru* case is in point. We make the following further references to the testimony on this point:

In the opinion of Capt. Miller, if there had been no agencies holding the Ship, "by Wednesday night she would have been overset" (Tr., p. 1433).

When Capt. Miller said that her only tendency was to go directly on the beach, he was referring to her tendency under the conditions as they "actually occurred," and "*what it would have been without the agency of the Inter-Island boats would be another proposition*, your Honor, and I may state for the sake of information that *no ship ever remains bow to the beach* when she strikes, *unless her stern is held* by an outside agency. She is bound to swing one way or other" (Tr., p. 1432).

Captain Piltz said the effect of the swell on her starboard quarter "would drive her broadside on the beach" (Tr., p. 1762), and that "the immediate assistance that she got is what prevented her from going broadside" (Tr., pp. 1763, 1934). He further described her tendency to roll mostly on her port side, and he "never noticed that she pounded on her starboard side. There was always a lurch toward her port side then she would turn upright" (Tr., p. 2058). Also that the danger, in case of her going broadside, lay in her "pounding and knocking her bilge, and the danger of

being a total loss, the vessel going broadside on" (Tr., p. 2062).

"Eventually she would go broadside onto the reef" (Macaulay, Tr., pp. 2197-8).

"She was in danger of going broadside on the reef, getting bilged and becoming a total wreck" (Macaulay, Tr., p. 2210).

Captain Macaulay repeatedly declined to say *how long* it would have been before she *would* have gone broadside if the Intrepid and other vessels had not taken hold, even when he was asked whether it would be a matter of hours or days or weeks (Tr., p. 2211), saying that "no living man could tell the time it *would* take," but it was only a matter of time on account of the current and the swell until she would be broadside upon the reef (Tr., pp. 2211-12) * * * "*Might have been that afternoon; might have been the next day; it might have been a month*" (Tr., p. 2212).

Once broadside, "that would be the end of it" (Macaulay, Tr., p. 2215).

The "Helga" took the same reef farther on, before daylight in the morning, and before eight o'clock was "broadside on the reef and the seas washing over" (Tr., pp. 2215-16).

The effect on the Ship, if she got broadside "would be that she would be liable to get bilged, . . . her bottom pierced by the coral" by the surging leaning her over (Tr., p. 2217), and the effect on her "would be the same" even though no hole were pierced in her, because if her weight should get on her bilge on the inshore

side it would bend her plates or frame and after she would start to leak she would become water logged (Tr., p. 2217).

And her keel cutting into the coral would not have been sufficient to have prevented it (Macaulay, Tr., pp. 2389 to 2391).

To counsel's theory that a boulder might have lodged against the port side of her keel and held her, Captain Macaulay replied: "I say those boulders would have pierced the Celtic Chief and there would have been no occasion for salvage" (Tr., p. 2391). We submit that Mr. Olson's motion (Tr., p. 2391) to strike the answer as not responsive, and the trial Court's final allowance of this motion (Tr., p. 2393) was obviously erroneous. With the question, "I'm asking you if there had been some boulders there *what would have been the result?*"—and the answer, "*The result would have been* these boulders would have pierced her bottom and she would have become waterlogged,"—we cannot see how the answer is not responsive as far as it goes. In any case this witness said (Tr., pp. 2473-4) she would have been "pierced" and her bottom "forced."

The ship, under the conditions referred to on page 2402, Transcript, could *not possibly* have maintained the same position (Macaulay, Tr., p. 2402).

In the judgment of Capt. Tullett:

"She was in great danger * * * from the swells setting her around and perhaps taking the whole side out of her * * * the swells would tend to lay her on her port bilge" (Tr., p. 2682).

"In fact, they naturally always do" (go broadside, etc.) (Nelson, Tr., p. 2787).

She was even in danger of it after the towing steamers took hold, in case of anything happening to their lines (Haglund, Tr., p. 2985).

Piltz, without being able to do what no one else could do,—but which counsel thought he *ought* to do before being qualified to judge how long it would take the Ship to go broadside,—i. e. give the force of the swell in *pounds*,—nevertheless was certain "It would take *less force than was pulling on her* to turn her broadside" (Tr., p. 1844).

The question of "how long it would take," put to Captain Piltz (Tr., p. 1807), resulted in a challenging cross-examination to prevent his giving any opinion (Tr., pp. 1807-24) and ended with an answer perfectly responsive: "with the conditions prevailing out there the first day, *it would have been less than a day*" (Tr., p. 1823).

In the opinion of Capt. Piltz the Inter-Island boats *did* prevent the Ship from going broadside (Tr., p. 1934).

See also: Weisbarth, Tr., pp. 655, 704-5; Miller, Tr., pp. 1620-21; Piltz, Tr., pp. 1645, 1807.

There was sufficient danger of it to make Miller unwilling to anchor (Miller, Tr., pp. 1681-2).

Further, as to the danger to the Ship and cargo, see: Miller, Tr., pp. 1432-33, 1620; Macaulay, Tr., pp. 2284-5, 2448; Nelson, Tr., pp. 2787-8; Haglund, Tr.,

p. 2985; McAllister, Tr., pp. 82-3, 91-2; Barrett, Tr., pp. 105-6.

Witnesses from the Ship of course endeavored to minimize the danger. Capt. Henry said she was in "no other danger" than "that of simply being aground on the reef" (Tr., pp. 142-3). Nevertheless he testified also that he was on duty continuously, and lay down only a few minutes, and had no sleep the whole time and was under a strain,—from which it is clear he was desperately worried about the safety of his Ship (Tr., p. 239). His idea that there was "no immediate danger" (Tr., p. 143) stands alone in the case. Certainly when he talked with Mr. Kennedy he "wanted all the help he could get" (Tr., p. 746).

The Current tends to the westward along this reef (Macaulay, Tr., pp. 2183, 2192), with a speed of from one to three knots (Tr., p. 2183), and affects the tide to a certain extent (Tr., p. 2710). This *also* tended to send the Ship's stern around to broadside.

The Ship was unquestionably unable to assist herself. A reading of Captain Macaulay's testimony, of how she was unable to do so, indicates only what Capt. Haglund brought out more particularly when the effort was made to show that the Ship might have brought on board a donkey engine from town to heave on her own anchors. Even then, it would have taken "all on Monday" to do it (Tr., p. 3120), and by that time the Ship would have been broadside without doubt. On Monday was the greatest danger, and Capt. Haglund says it would have taken a *day* even if the Inter-Island

Company were doing it (Tr., p. 3205). And, besides, they *tried* to unshackle one of the Ship's anchors to put it out to pull on, but were unable to do so (Macaulay, Tr., pp. 2311-12); Haglund, Tr., pp. 3096-3111, 3120). The fact is that she was going harder on the reef right along tending to broadside more at first than when assistance removed that particular danger, after which she continued to move directly in, bow on, until that also was prevented. The evidence is somewhat conflicting as to how long the Ship continued to move in, and we will review it at this point.

By the weight of the testimony, the Ship gradually moved in on the reef by the action of the swell until by Tuesday evening she was on her full length.

Lonche: "Every time one of the largest swells hit her it would heave her stern up and she would have a tendency of going further ashore all the time (Tr., p. 443). But not after Tuesday" (Tr., p. 448).

Weisbarth: "He thought 250 or 300 feet up to Wednesday morning (Tr., p. 656. But he didn't know about Tuesday (Tr., p. 658),—(because he wasn't there on Tuesday). Tuesday p. m. to Wednesday morning,—*only a little bit* (Tr., p. 697). 100 or 150 feet in all between his first observation on Monday and his last on Wednesday" (Tr., p. 698).

Kennedy: "*Monday night to Tuesday morning, 36 to 40 feet* (Tr., p. 759). *Tuesday morning to Tuesday night, 5 or 6 feet* (Tr., p. 759). *Tuesday night to Wednesday morning, no change*" (Tr., p. 760).

Macaulay: "The swells made her take the reef (Tr., p. 2195). The first day she moved in on first ledge sufficient to put her on full length (Tr., p.

2263). Kept going in easy on Monday (Tr., p. 2378). *Tuesday morning to Wednesday morning, 6 feet* (Tr., pp. 2279-80). *None after Wednesday morning*" (Tr., p. 2281).

Watkins: "About 70 feet from say 10 a. m. on Monday until Wednesday morning" (Tr., pp. 3287-89).

Schroeder: (Answer to Miller cross-interrog. 3 (Tr., p. 397), shows Ship did not move in *after Wednesday morning*).

Henry: Admitted that the swells "helped a little" (Tr., p. 165).

(Note: Capt Henry failed to mention the agency that the swells added to).

Lowry: Hardly 50 feet (Tr., pp. 309-10).

See also: McAllister Depn. 99; Lonche, Tr., pp. 226-7.

Conneman said 20 meters (= 65 feet) during Tuesday night (Tr., p. 424), but this would not be correct unless from Tuesday morning until Wednesday morning.

Capt. Henry claims she did *not* go further in (Tr., p. 135), but admitted on cross-examination that she may have gone in "a bit" (Tr., p. 165).

We here refer to Mr. Watkins' testimony (Tr., pp. 3288, 3301), as to having heard a discussion between Captains Macaulay and Schroeder on Wednesday morning in which Macaulay maintained that the vessel had not lost any ground. Mr. Watkins understood that this discussion related to the time from Tuesday to Wednesday. Clearly Macaulay meant that a move of *six feet* (see Tr., pp. 2279-80, 759), was not "losing ground."

Of the testimony of the several witnesses shown above, we think that that of Messrs. Kennedy, Watkins and Macaulay is most reliable. Bearings taken from on shore ought to be more dependable. Mr. Watkins had an excellent set of observation points, and his report of about 70 feet from 10 a. m. on Monday until Wednesday morning), he having made no segregation of the distance for Monday, Tuesday or Wednesday separately), is not far from Mr. Kennedy's 46 feet, in view of the fact that Mr. Watkins saw the Ship from near right angles while Mr. Kennedy thinks he may have seen her at a different angle. Then, too, it will be noted that Capt. Macaulay's *six feet* coincides with Mr. Kennedy's 5 or 6 for the time between Tuesday and Wednesday morning, (he having made no segregation of the morning) there was *no change*.

Before leaving the subject of the Ship moving in, we are aware that Capt. Miller claims it was his anchor that stopped her moving in. This will hardly be taken as the fact, when she only went in 5 or 6 feet from Tuesday to Wednesday morning, and after Wednesday morning none at all, considered in connection with the fact that he did not get any strain on his anchor line until, by the testimony of his own witnesses, in the afternoon (Clarke, Tr., p. 1032), along toward evening; Ekau said about an hour before sunset (Tr., p. 1250), and Makalena said about sunset,—about six o'clock (Tr., p. 1330). Witness Lowry also said it was about 5 p. m. (Tr., pp. 279, 295-6).

We would like also to note, by way of explanation, that all of the examination of Capt. Macaulay on pages 2264-2279, Transcript, was under a mistaken idea of counsel for the Inter-Island Company that Capt. Macaulay had, by the *compass* bearings taken (referred to on pages 2263-4, Transcript), calculated the distance the Ship had moved. Counsel pressed it because of confidence that Capt. Macaulay could prove himself right, but it developed that Macaulay had not meant compass bearings and that he had used *other* observations on which he based his testimony that she moved in 6 feet. Therefore the question was withdrawn (Tr., p. 2279).

It is also proper to mention, by way of some explanation of the Ship moving in on Monday in spite of the vessels pulling, that Miller's barges were fast to her on either side, not anchored but dragging on her, and increased the "striking surface" receiving the force of the swells, the entire force thus acting on the Ship itself. Miller admitted this was the case and the effect of it (Tr., pp. 1547-8).

The danger to the cargo of the Celtic Chief, lay in its being wet by the vessel springing a leak by opening her bilges or being pierced (Tr., p. 2063).

Witness Piltz ventured the opinion that the fertilizer would be destroyed by being wet, and Ship's counsel arose to impeach him on the ground that he wasn't an expert; but the witness made the point of fact that the fertilizer which got on the deck and got wet became very sticky, and considerable of it was destroyed (Tr.,

p. 2063). To rebut the idea advanced by another witness that this fertilizer would dissolve rapidly, the witness Watkins was called as an expert chemist to show that the Loch Garve cargo to which the witness had reference was nitrate of soda, which dissolves very rapidly, as equal parts of nitrate of soda and water will dissolve inside of 10 or fifteen minutes (Tr., p. 3296); but that the cargo of the Celtic Chief, being sulphate of potash and double manure salts, and not soluble so readily, (requiring 13 parts to 100 parts of water, see page 3284, Transcript), would take *longer*. How long, was not emphasized on the direct examination. On cross-examination, it developed it would take "at least an *hour*" (Tr., p. 3207), and if the quantity of water were *doubled* "it ought to go into solution quicker" (Tr., p. 3207), because upon her bilging she would *break* and let in all the water necessary.

It would seem to us that "old ocean" would be able to double (a few times) the 100 parts of water, and also overcome the 2% advantage fresh water has over sea water as a solvent (Tr., p. 3296). And if the Ship had opened her bottom and flooded her hold with sea water, *some* of it would be wet beyond recovery within an hour or *a day*.

And on Mr. Watkins' own statement, if the cargo were once wet and mixed, the expense of recovery would be so great that the cargo "would simply be abandoned" (Tr., p. 3299).

With the foregoing presentation of certain features of the case, by way of introduction to a consideration

of the services rendered by the different salving agencies, and their value, we proceed to our discussion of the operations themselves.

THE CASE FOR THE INTREPID.

With respect to the assignments of errors, numbers 10, 11, 12 and 13 in the Matson Company suit (Tr., pp. 3409-10), appellant claims first that the Intrepid rendered no service; second, that no success attended her efforts; third, that she was "discharged for cause;" and, finally, that because the tug did not agree to give way to the Arcona her claim for salvage should be forfeited in any event.

In reviewing the case for the Intrepid, we will deal with these claims in their order.

The Matson steam tug "Intrepid" arrived at the scene of the stranding closely following daylight on Monday morning, December 6th. The exact time of her arrival must be determined from the following testimony: Macaulay said 6:30 a. m. (Tr., p. 2189); McAllister said 7:15 a. m. (Tr., p. 81); Henry said 7:30 a. m. (Tr., p. 118); and Brisco said 8 a. m. (Tr., p. 319).

There was no "hold up." The Tug's Captain, McAllister, hailed the Ship and asked if assistance was wanted. The answer from Capt. Henry was, in his own words, "I asked him if he would *give us an offer* to tow us off" (Henry, Tr., p. 118). It was a case of "what price" at the instance of Capt. Henry himself.

Capt. McAllister, like most people who dicker in a speculative bargain, named a figure which he readily expected to cut in half,—\$20,000, and as it was declined he *did* cut it in half, and this being also declined he said *no more* about terms except this: “*leave it and we will settle it shore.*” Henry said, “I agreed to that, and then his line was passed aboard the ship.” (See Henry, Tr., pp. 118-19). This is the same in substance as testified to by McAllister (Tr., p. 90). And see Lowry, Tr., pp. 282-3. All this transpired within a very short time. McAllister said that in naming \$20,000, “I just merely spoke of it in a manner” (Tr., p. 90). McAllister didn’t stop to argue, and did not lay by while talking, but backed right in and passed his line (McAllister, Tr., pp. 90-1). Capt. Henry says also that the talk with McAllister did not take “a great deal of time,” and that from the time McAllister came alongside *until his hawser was fast* was only 10 or 20 minutes (Henry, Tr., p. 163). See also, Lowry, Tr., p. 285. Brisco said 5 or 10 minutes (Tr., p. 231). Macaulay said it was a very short time (Tr., p. 2200). Consider this in connection with the fact that McAllister had to take soundings as he approached, not knowing the draft of the Ship nor depth of the water (Barrett, Tr., pp. 102-3, 108-9), and it will be seen that McAllister did pretty rapid work, especially in view of the condition of the sea, as heretofore indicated in this brief.

Note here, from Barrett’s testimony (Tr., p. 108), that they talked for two minutes, during which he heard only the part about whether or not a line was wanted,

and then he lost the rest of the conversation because he started his engine again, backing in,—showing the tug was already getting busy, not standing on terms.

The tug's line was (in circumference) a 10 inch (Lowry, Tr., p. 283), or a 13 inch (Barrett, Tr., pp. 103, 109), or 12 or 14 inch (McAllister, Tr., pp. 85, 93) Manila, with a 11/8 inch diameter (Barrett, Tr., pp. 109-10), (Haglund, Tr., p. 2904), or 3 1/2 inch circumference (McAllister, Tr., p. 83; Lowry, Tr., p. 283), steel wire attached to it, having an eye spliced in the end (Lowry, Tr., p. 283; Macaulay, Tr., p. 2190; Haglund, Tr., p. 2904), the wire portion being about 50 fathoms long (Lowry, Tr., p. 265), its whole length being about 20 or 30 feet shorter than the line to the Mikahala (Tr., p. 2903), which was about 513 feet (Tr., p. 2903), making the Intrepid line about 488 feet long. Capt. Macaulay thought it from 300 to 400 feet long (Tr., p. 2191).

The wire end of this line was run through the starboard quarter chock of the Ship and made fast by dropping it over the top of the starboard after bitts (Macaulay, Tr., p. 2191; Henry, Tr., p. 119). The Intrepid then "started in towing astern full speed" (Macaulay, Tr., p. 2191), between starboard and directly astern (Kennedy, Tr., p. 750; Miller, Tr., p. 1613).

In view of the claim of certain witnesses that the tug didn't pull with any particular force or effect, we make the following references to contrary testimony:

"The Intrepid was there pulling on her" (Lonche, Tr., p. 443).

"She was pulling, all right" (Kennedy, Tr., p. 750).

"All she could, and it was taut" (Miller, Tr., p. 1613); and see Tr., p. 1649.

"She pulled very vigorously; she seemed to me to pull for all she was worth when the line was made fast; right from the start she pulled hard" (Macaulay, Tr., p. 2200).

"Well, the Intrepid, while she was alone, she pulled *extra hard*, as near as I could say, but after the arrival of the Mikahala, it seemed to me that she didn't pull so hard, kind of eased up" (Macaulay, Tr., p. 2223), a possible reason being that the tide was falling (Macaulay, Tr., p. 2437), or perhaps short of water (Tr., p. 2437). See also Macaulay, Tr., p. 2438. But see further on page 2440, where he corrected this by saying it *appeared* to be so, but he did not wish so to testify.

"It was pretty taut (Tuesday and up to noon of Wednesday). About (Haglund, Tr., p. 2904). There was more or less sag, and might have touched the water in a particular spot at all times (Haglund, Tr., p. 3036).

The first day "it sagged a little in the middle" and occasionally touched the water, with the swell (Macaulay, Tr., p. 2201).

All of her power was put on in the towing, and "every high tide we put on passovers"—a passover meaning "live steam with low pressure engine," which increases the power of the engine (Barrett, her engineer, Tr., pp. 103-4). At low tide "just common full speed ahead" (Barrett, Tr., p. 104); and it didn't slack (Tr., p. 110).

After making fast "I gave her all she had" (McAllister, Tr., p. 84), and kept "full speed right straight through" (Tr., p. 88). The hawser would slack some in the swell, and hang in a bight, and pick up again (Tr., p. 93).

While Captain Henry claimed "there was not very much; not a great deal," of strain on the Intrepid's line (Henry, Tr., p. 125), although "there was times when there was more strain on it than others" (Tr., p. 125), and that when the line was out on Wednesday there was "very little" strain on it (Tr., p. 125), he had to admit that he had to ask the Tug to *slack up* because he wanted to throw off the line (Tr., pp. 123, 184).

Although Brisco said there was only "a little" strain on the Intrepid line, he had to admit, when pressed, that he did not take "much" notice of it, and finally to confess that he had not noticed the line at all (Brisco, Tr., p. 322), and had to say still further that *he did not know* (Tr., p. 323).

The Intrepid line was only dropped over the bitts (2 iron posts with flanged tops), yet he couldn't take it off unless the tug slacked up (Henry, Tr., p. 183; Lowry, Tr., p. 266). We would like here to refer to Capt. Henry's testimony (Tr., pp. 124-5), where he said that when the Intrepid line was cut "we had to shove it out through the wharfing chock to get clear of it," as it "did not pull itself clear of the vessel of its own accord;" and it was shoved off because it "would not go out." No one could read these statements, made as they are in connection with the strain of the Intrepid on her line, without taking them to mean, unqualifiedly, that the line was so slack it stayed loose on board after being cut. This is a sample of the unfair and unfrank and misleading trend of the testimony of this witness as a whole. Had he been *fair* he would

have testified to the *whole* truth, as Lowry did on this same point, that the line ran out and *stuck* and *jammed* in the chock (Lowry, Tr., p. 267). How could Lowry have said he was "expecting to see it jump over the side" if there was no strain on it? (Tr., p. 267.)

Moreover, although the witness Lowry said the Intrepid line "had a bight in it always" (Tr., p. 268), he was frank enough to add that "it was not in the water all the time, but it was *touching* the water. When the tug fell the rope would go in the water, *as the tug is low in the water herself*" (Tr., p. 268).

The effect of the Intrepid's work, especially on Monday before other assistance arrived,—and we urge that *here* the tug earned her salvage award in any case,—appears from the following uncontradicted evidence:

In the maneuver to get the ship from position 2 to position 3 (see Macaulay, Tr., p. 2192-94), the Huki and Intrepid, by pulling when the starboard anchor was taken up, insured getting into position 3 "which was *a big aid* to the vessel," brought about by them (Tr., pp. 2194-5).

"The whole ship was swinging gradually to the nor'ward before the Intrepid and the Huki arrived. There was quite a nasty swell. The swell kept heaving in, heaving her in all the time, and with her starboard anchor put down, it, of course, checked her some; *but when the Intrepid took hold* and the Huki took ahold, *they checked that swing*. *They held her stern for the time being until we got real good assistance*, and while they held her" the starboard anchor was

taken up to better the ship's position (Tr., p. 2198). It made the ship's position "much easier" (Tr., p. 2201). And see Tr., p. 3352.

And Captain Macaulay, in answer to the question: "With the bow held by the anchor in position 2, the swell striking the ship on the starboard side, what prevented her stern from swinging in on the reef?" the witness answered, "The Tug Intrepid." (Tr., p. 2199.)

Bear in mind that in position 2 the ship was much more to broadside than afterwards, and an hour more without assistance (and the Mauna Kea, the next boat out, didn't arrive until after 9 or 10 o'clock [Tr., pp. 749, 1761],—two or three hours later), *might* have seen her fully broadside.

With the southerly weather then prevailing,—*why she didn't* go broadside before aid arrived on Monday, was beyond the power of Capt. Macaulay to say. His answer was, "The Almighty had control of the elements" (Tr., p. 2384).

Macaulay considered that the assistance of the Intrepid was sufficient to justify him in taking that anchor up (Tr., p. 2218). That he would not have done so, otherwise, (Tr., p. 2199), shows how imminent the danger was.

McAllister says the services of the tug were certainly of value in preventing her going further on the reef (Tr., p. 88).

Barrett says that but for the tug she would have gone around (Tr., p. 106), and that the tug held her stern to the sea (Tr., p. 113).

In Haglund's opinion it is an easier matter to keep a ship from canting than to pull her off (Tr., p. 3108).

We argue, also, that if a tug, whose business it is to tow ships, could move a whole ship, free, even in the face of tide and swell or a rough sea, she ought to have power enough to hold one end of a stranded ship from *turning*.

In all, the Intrepid pulled from about 7 a. m. on Monday until about 12:20 on Wednesday, 53 to 55 hours (Barrett, Tr., p. 103; McAllister, Tr., p. 87-8), when her line was cut.

So far as danger to the Intrepid is concerned, she ran little, perhaps. She did endanger her engine, by using "passovers" (Barrett, Tr., p. 104), and she ventured into pretty shallow water, drawing 12 feet, and the bottom being likely to have rocks and boulders sticking up. Barrett says she *did* bump her rudder (Tr., p. 103); McAllister said not (Tr., p. 92).

The dependency of salvage upon "success" does not mean that actual aid rendered, which contributed substantially to the salving of a vessel, must go unrewarded if the agency which rendered it does not take part throughout. The service actually rendered was at a very critical time. It cannot be said *how* vital it may have been. It cannot be said that the Ship *would* have gone broadside but for the tug Intrepid, but still less can it be said that she would *not* have turned.

As to the tug's captain declining to let go his line, it may first be noted that the Intrepid did not refuse to make room for the Arcona. Nor does it follow that

the Arcona could not otherwise have assisted had her Commander been so disposed.

Finally, no prejudice whatever resulted to the Ship, as we will presently show.

We do not argue and have not argued from any standpoint of preference as between salvors, nor would we discuss salvage from the standpoint of benefit to the salvors.

The only question fairly involved in the issue as to whether or not the Intrepid was justified or unjustified in declining to cast off its line under the circumstances, is whether or not there was or was not sufficient room for the Arcona to have carried on salvage operations without displacing other salvors.

The argument has heretofore been used by appellant that the Intrepid acted in disregard of the interests of the stranded vessel and looked rather to its own interest; this being upon the assumption that the tug was attempting to deprive the stranded vessel of a presumably more efficient agency in order to claim more service and more salvage for itself. We shall presently indicate that the attitude of the Commander of the Arcona was such that the conclusion may fairly be warranted that any aid which was to be rendered by the cruiser was to be secondary—the primary object in the mind of her Commander evidently having been to do what he did with kid gloves and look first to the safety of his own vessel.

The cutting of the Intrepid's line was, we submit, under all of the circumstances, unfair to the Intrepid,

because it does not appear that her being there would have interfered with the salvage of the vessel. Except for the gasoline launch Huki, which was "no comparison" with the Intrepid, and a "negligible quantity on a ship of that size" (Tr., p. 1614, (and see Tr., pp. 2367, 2370, and Henry, Tr., pp. 167-8), the Intrepid was first out to the rescue, and her Captain naturally wanted to hold his place (McAllister, Tr., pp. 94-5), because he presumed that there was room enough for any seamanlike maneuvers upon his moving to one side, which he did. Moreover, the position taken by the Commander of the Arcona was arbitrary, unusual, unreasonable, and uncalled for, because he made it an absolute condition of his coming out at all to give "assistance," that he must be given the *best* position, and as this was held by the Intrepid (Tr., p. 2504), he demanded that she be removed.

Capt. Henry said, in answer to a question why it was necessary to cut the Intrepid's line in order to get the services of the German cruiser, "Because I could not get any *other position* for the German cruiser" (Tr., pp. 121-2). This is wholly inconsistent with the real fact that he couldn't because the Arcona *would not accept* any other. Referring to the Arcona's Commander, Capt. Henry testified, "He was willing to give assistance *on the condition* that I would get the Intrepid *out of that*" (Henry, Tr., p. 123). And see Henry, Tr., pp. 168-9.

Mr. Watkins said the Commander told Captain Henry in his presence, "that he wanted that position

and unless that was made clear for him that he would not take hold" (Tr., p. 3292).

And *why*, we ask, did the Arcona *have to have* that particular position? Apparently just because her Commander *wanted* it, and made it a condition precedent to his agreeing to come out at all,—a sample of the imperiousness that characterized his whole attitude.

It is argued that the Arcona was a "much more powerful vessel" and therefore entitled to preference.

Opposite counsel on the trial seems to have absorbed some of the ideas of the German Commander in this respect when he advanced to witness Piltz the idea that he certainly should have moved the Mikahala further over in view of the possibility that that powerful vessel might have moved over in *that* direction (Tr., pp. 1835-6).

There really was room, and the Intrepid made room,—sufficient for any *seamanlike* maneuvering to get a line on. How was McAllister to know that the "big powerful" vessel wanted to run two little lines instead of one "big powerful" line? Or that the two lines to be run had to be exactly astern to balance each other? There was an abundance of room to have run a towing line without any interference with any of the salvors. The tug Intrepid made room for the operation of laying the Miller anchor, by moving close over to the Mikahala, as Capt. Henry had to admit (Tr., pp. 168-9), and he had to admit further *there was then room for the Mokolii towing the Makee to come in between the Helene and the Intrepid, and for the Makee to be*

drawn right in to the Celtic Chief and out again (Tr., pp. 168-9), and to admit also that this operation was successfully carried on without danger to *any* of the vessels (Tr., p. 169), and that there was *plenty of room* "after the Intrepid moved over" (Tr., p. 170). Piltz testified to the Intrepid coming close to the Mikahala, and said there was nothing of danger from it (Tr., p. 1826).

And when the Arcona was coming out (the letter to McAllister having been previously delivered to him) the Intrepid again moved over close to the Mikahala and was *close to her* when her line was cut (Henry, Tr., p. 183).

That there was ample room to run in a line or even two lines is shown by the following testimony.

The Arcona and Intrepid would not themselves have been near enough to have been in any danger of touching, because the Intrepid was about 408 feet from the Celtic Chief (Haglund, Tr., p. 2902) * * * because Haglund *knew* the Mikahala to have been about 513 feet from the Ship and thought the Intrepid 20 or 30 feet less, and the Arcona, when in position, was 200 meters (650 feet), by the testimony of her own officers (Schroeder, Tr., p. 394, and Conneman, Tr., p. 429), and Haglund said "about 660" (Tr., p. 2902).

And between the Helene and Mikahala it was "all of 300 feet" (Piltz, Tr., p. 1285), and the Intrepid was ordinarily "about three-quarters of the way towards the Mikahala" (from the Helene), (Piltz, Tr., p. 1220), and the Intrepid ranged closer than that and once or

twice came alongside the Mikahala and touched (Piltz, Tr., p. 1826), and there was "nothing in her coming up alongside the Mikahala in that way" * * * "no more danger from that fact" (Tr., p. 1826).

With the Intrepid say 25 or even 50 feet from the Mikahala, there would still have been about 250 feet between the Helene and Intrepid for a line to have been run in while the Arcona held a position midway. With 100 feet clear on either side of her (allowing 50 feet for her own width out of the 250), between the Helene and Intrepid, the Arcona would have been as safe as the Mikahala and Intrepid within 50 feet or less of each other, or the Helene and Likelike, which were about 100 feet apart (Haglund, Tr., p. 2907).

Consider the "warning" given McAllister that his line would be cut. The letter (Tr., p. 2490), although requesting the tug to *let go*, shows that the *purpose* was to make room for the cruiser, and that the Intrepid might continue to pull, but from another position. Capt. McAllister made all necessary room by moving over. He says he had no other warning except a message given him by Mr. Singlehurst who asked him to *let go* (McAllister, Tr., p. 94), and he refused because he didn't know who Singlehurst was, although he learned afterwards (Tr., p. 7). At that time *nothing was said about his having another position,—only to let go*, or his line would be cut. So McAllister replied, "That's up to you, whoever you may be." (Tr., p. 85.) And see Weisbarth. (Tr., p. 604).

The witness Lowry, who did the hailing of the Intrepid, says he did it *only once* (Lowry, Tr., p. 267).

The defense will argue that the Captain of the Intrepid had no right to try to stay there to prevent the ship receiving the aid of the cruiser. We reply that if the case had been that Capt. McAllister were informed that it was an absolute condition that the cruiser *would not* attempt to assist unless the Intrepid were *moved away* from that position, *then* it would have been wrong for him deliberately to have stood in the way of the ship receiving that aid.

But Capt. McAllister was *not so informed*, and, we submit, he would not reasonably suppose the cruiser would have made such an extraordinary condition to rendering assistance. Capt. Henry "*did not say or state to Captain McAllister* that those were the conditions on which the Arcona would pull." He says, "*No, certainly not; I had no reason to do so.*" (See Henry, Tr., p. 169.) That wasn't fair to McAllister.

Suppose the German Commander, in the same spirit, had called for the entire maneuvering room (it seemed that he needed it if his maneuvering shown indicates anything), and wanted the other vessels also to "get out of that." Would it have been the duty of all the vessels to have obediently let go and withdrawn, to give him a free hand and the surrounding ocean to demonstrate the mightiness of the German Navy? We submit not. There is a reasonable range within which any ordinary mariner, aiding in salvage, may determine whether the demand of the new comer is reasonable or

unreasonable, and how far egotism and arrogance should be permitted to interfere with common salt water sense. We respectfully submit that the Captain of the Intrepid had a right to look for common maneuvering skill at least from the Arcona, and that there was plenty of room for that.

Even Capt. Miller, regarded by appellant as guilty of reprehensible conduct, and although fighting the Intrepid in this case, considered that the cutting of the line was a "downright dirty piece of work" (Tr., p. 1676).

In any case, the refusal of Capt. McAllister to let go did not in any way operate to the prejudice of the Ship, nor delay the Arcona in any respect, *because the cutting was done* while the Arcona was coming out of the harbor and *before she arrived* (Macaulay, Tr., pp. 2490-1).

Her line having been cut, however, the Intrepid did not abandon the ship, but told the master of the Ship "that she was there waiting and ready to render any other assistance" (Macaulay, Tr., pp. 2491-2); and Capt. Macaulay says further that "she was there ready to render assistance," but was not asked to render more (Tr., p. 2492). McAllister says, "I went aboard of the Ship and saw the Master, and asked him if he required my assistance any more. He told me no. I said, 'well, I will lay here anyway within hailing distance of you. In case you need me I am in hailing distance.'" (McAllister, Tr., p. 86), "and he said, 'all right'" (McAllister, Tr., pp. 95-6). And the tug

"stayed there until the vessel went into port" (McAlister, Tr., p. 95-6). And see Barrett (Tr., p. 105).

But Capt. Henry did not make good the terms of his letter by offering to take a line from the Intrepid from some other part of the ship, although Capt. Macaulay, knowing all of the circumstances, thought that, according to the terms of his letter, Capt. Henry having cut the line *should* have had something "more to do" with the Intrepid (Tr., pp. 2491-2).

We refer the Court to the case of *The Amsterdam*, reported in 7 Aspinwall N. S. 400, as bearing on the consideration which should be given the Intrepid for having thus stood by.

OPERATIONS OF THE INTER-ISLAND STEAM NAVIGATION COMPANY., LTD.

Promptitude Initially:

At about eight o'clock on Monday morning Mr. Kennedy was informed that the Celtic Chief was ashore and he went down immediately in his automobile to the Inter-Island wharf, where Capt. Haglund told him that the Ship was just reported on the reef (Tr., p. 746). He immediately gave orders for the Mauna Kea and Mikahala to get up steam. It is clear that the Mauna Kea and Mikahala, not having to go up on schedule until Tuesday (Tr., pp. 2889, 2958), did not have steam up on Monday morning. At that time the Iwalani (also an Inter-Island steamer) was practically ready and was able to get under way in 10 or 15 minutes, and in that

time Mr. Kennedy went out in her to the Ship, and aboard her at about quarter of nine o'clock (Tr., pp. 749, 770-71), and expressed sympathy and offered assistance, to which the Ship's Captain replied that he "wanted all the help he could get" (Tr., p. 746). Help was requested.

Stopping only long enough to size up the situation Mr. Kennedy immediately went back in the Iwalani and ordered the Mauna Kea and Mikahala to go right out (Tr., pp. 746, 749). There was nothing said about terms or charges.

Having gotten steam up the Mauna Kea got away first (Tr., pp. 1770, 2201), arriving before eleven o'clock (Tr., p. 2205). The Mikahala followed, also arriving a little before eleven o'clock—or a little after (Tr., pp. 771, 1764). In the case of the Mikahala it was only "about fifteen minutes after we dropped the anchor until we started pulling full speed" (Tr., p. 1764).

INTER-ISLAND LIGHTERING.

The lightering done by the Inter-Island Company by use of its small boats, in the open sea from a vessel hard aground, and carrying the cargo across the field of the hawser operations to other vessels of the Inter-Island Company, was unusual and dangerous. It was not mere "lightering" any more than towing on a stranded ship would be mere "towage."

Captain Haglund, the Inter-Island Superintendent, first went out to the Ship a little before seven o'clock

on Tuesday morning, going out on the steamer *Helene*, which arrived there shortly before eight o'clock (Tr., pp. 3017-18). He went on board the *Mikahala* for a few minutes and went on board the *Celtic Chief* (Tr., p. 3018), and made the arrangements for lightering (Tr., pp. 752-4), which was requested by the Ship's master (Henry, Tr., p. 203).

Yet again, on the point of Inter-Island lightering: Counsel have heretofore urged that the Inter-Island Company was "actually negligent" in beginning to lighter the *Celtic Chief* "without having out anchors to prevent it from going ashore." Counsel appear in the case for one John Henry, *Claimant*, and *Master* of the *Celtic Chief*. In the first place the Inter-Island boats *did* put out their anchors first, and we will elsewhere indicate to the Court their holding power and the testimony that they did hold the ship substantially. But, consider this claim as coming from the *Claimant*, who engaged Miller's lighters immediately, and insisted on the work going on, and who was angry when Miller didn't return as per agreement to continue it, and who, on that occasion wanted the Inter-Island to hurry and get at it again (Tr., pp. 202-3, 248, 660-1, 752, 1351-2, 1355, 3054-5). *Claimant* would put the salvors to a penalty for continuing what he initiated.

In response to the request to lighter, Captain Piltz, then mate of the *Mikahala*, was sent on board the ship, arriving there at about eleven o'clock Tuesday morning, to attend to the lightering of the cargo (Tr., p. 1770). Lightering was begun on the main hatch (Tr.,

p. 1770), at about eleven o'clock (Tr., p. 2013), and continued up to noon, and during the dinner hour the after hatch was rigged, and with an increase of men at one o'clock, both these hatches were worked all that afternoon and all evening and until two o'clock in the morning (Tr., pp. 1771, 1774, 3089). In all lightering the work was done by men from the two steamer crews and extra stevedores employed by the Inter-Island Company, about 100 in all (Tr., p. 1774), and the boats used were the steamer boats of the Helene and Mikahala (Tr., p. 1770). When Mason testified (Tr., p. 956), that some of *Clarke's* men were discharging freight into the Inter-Island boats, he was mistaken. He didn't know (Tr., p. 968). On Tuesday and up until 2 o'clock Wednesday morning five boats were working, three of the Mikahala and two of the Helene (Tr., p. 1774). Later there were three also from the Helene (Tr., p. 2014). Lightering was resumed at both hatches, using the Ship's winch, about 6 o'clock Wednesday morning and continued until noon (Tr., pp. 1776-7, 2983).

To go back a moment from this point, the Ship's winch had been used as the power to draw the sling-loads of fertilizer from the hatches (Tr., p. 1771), the falls being taken to the gypsy heads on opposite sides of the winch and the power applied alternately (Tr., pp. 1771, 1775, 2983), because for some reason the winch could only lift one load at a time (Tr., pp. 1775, 2882), even though there were only three or four bags (Tr., pp. 755, 1775, 2818, 2982, 2283), to a sling. It

couldn't raise six bags at all (Tr., p. 2882). With a load of four bags the winch would hoist "very, very slowly" (Tr., pp. 2982, 1775). *Something* was wrong with it (Tr., pp. 822, 755-6, 1775, 2283, 2785). Salt water was used (Tr., pp. 2883, 2983, 1775, 2283). It could not lift more than half a ton at the most. (Hag., Tr., p. 3007). The fertilizer bags were different sizes, some heavier than others (Tr., pp. 756, 2886), and weighed about 200 lbs. and some perhaps 250 lbs. (Tr., pp. 756, 1776, 2885), or an average slingload would weigh 700 or 800 lbs. (Tr., p. 1776).

Mr. Kennedy saw, on Wednesday morning, that the Ship's winch was being used to haul in lines, and it couldn't in his judgment work fast enough anyway (Tr., p. 755), so with the assent of the Captain of the Ship (Tr., p. 755), he returned ashore and sent out a donkey barge and hoist (Tr., p. 756), hired by the Inter-Island Company from McCabe, Hamilton & Renny (Tr., p. 754), just previously arranged for, subject to call (Tr., pp. 754-5). This floating donkey hoist was brought out at about noon on Wednesday and was moored by an anchor of its own (Tr., p. 2008), and lay opposite the main hatch on the port side (Tr., pp. 1777, 2007), and was used thereafter to work the main hatch. The Ship's winch continued to be used for the after hatch alone (Tr., pp. 1777, 2885, 2983; Henry, Tr., p. 158). At about 11 p. m. Wednesday night work was stopped on the main hatch (Tr., p. 3156) to get the scow out of the way. There was "no comparison between the two"—the ship's winch and the donkey on

the barge (Tr., p. 2284). The barge hoist took 6 to 8 bags (Tr., p. 3204), and did it in half the time (Tr., p. 2984). The cargo from the after hatch was received by the boats on the port side of the ship, and on the starboard side from the main hatch (Tr., p. 2009).

The fertilizer taken out was put on board the Helene and Mikahala, first on the latter and then on both (Tr., p. 1778). The lightering from the after hatch continued right up to about 11:30 p. m. Wednesday (Tr., pp. 1778, 3090). Lowry even said "right up to the time we floated (Tr., pp. 278, 286, 290), and Henry the same (Tr., pp. 137, 138). In all the Inter-Island Company took out about 365 tons (Watkins, Tr., p. 1203). See Henry (Tr., p. 127), and Haglund (Tr., p. 3095).

The Danger Incurred in Lightering:

On account of the swell and general conditions prevailing during the salvage operations considerable danger was involved to the Inter-Island small boats and the life and limbs of the men engaged. It is not contended that the danger was extreme, nor that the men deserve medals. We submit that the danger was considerable,—and considerably in excess of the risk attendant upon discharging freight among the Island ports. In any case it seems to us that it is no argument to say that because in the Inter-Island work there are occasionally times when considerable risk *is* run by the boatmen, and boats are occasionally lost or broken or overturned, and men drowned, killed or injured, there is no merit in the service rendered at the Celtic

Chief because there has *sometimes* perhaps been *as much* danger run elsewhere as at the Celtic Chief. We say that the very fact that these men were, by their practice, skilled and daring, and could undertake and execute such work, rendered their service more valuable to the ship. Without that skill enabling them to go closer to the danger line and do with a less degree of danger what no landsman or ordinary seaman could have dared to do, the work could not have been done.

It is urged by Counsel for the appellant that the danger was negligible; that swamping of the small boats was a mere possibility, as also was the danger of men being struck by the sling loads. Also it is said that the swells were no greater than encountered in the ordinary course of the Inter-Island business. It is claimed that Capt. Tullett has admitted this (citing Tr., p. 2693); and that Watkins says it was smooth in comparison with what we see every day in trips to the other Islands (citing Tr., p. 3294).

The citations just noted are examples of those often made by appellant's counsel, and will not bear out the points sought to be made when further statements of the same witness are considered. The citation of Tullett's answer on page 2693 is intended to show that there was no danger here more than in the ordinary course of business because in ordinary business swells often run as high as then. But the witness was then referring simply to the bare point of height of a swell. He immediately proceeded to show that *at sea* both the vessel and small boats rise and fall more or less to-

gether (Tr., pp. 2695-6). Again, the reference to Watkins' comparison of the operations there with those of the Inter-Island boats at other ports, must be considered with his further replies on cross-examination on the point, where, when asked to give an instance, he picked out one where in his *own* judgment, it was "rather dangerous" (Tr., p. 3303), and explained why (Tr., pp. 3303-4),—all in a case where the vessel was afloat in deep water.

Let us look at the testimony. Mr. Watkins, the active representative of the ship and cargo here (Tr., pp. 1212, 3285-6), thought the work at the Celtic Chief in the small boats was less difficult than in the Island work, and compared the two (Tr., p. 3294). This comparison being referred to on cross-examination he was asked if, *in making it*, he had had any particular ports in mind. His answer showed he had in mind a trip taken thirteen or fourteen years previously, when he observed the discharge of freight, when it was rough, and thought that "the operation was rather dangerous because it was exceedingly rough" (Tr., pp. 3303-4). In *his* opinion, "when a surf boat is alongside of a vessel and there is a very heavy swell, why, the crew in the boat have got to look out that the boat is, at least they have got to keep their boat from being banged against the side of the vessel; they've also got to look out for the sling, that the sling doesn't strike them coming down, and *those are conditions that I call difficult*. In rough weather all hands have got to be on the alert that they don't get hurt themselves or that

they don't hurt the cargo or that they don't hurt the boat" (Tr., pp. 3303-4). He admitted at the same time that the Concord and Kaimiloa were surging (Tr., p. 3304), and "were doing considerable rising" and had "a violent strain" on their ropes (Tr., p. 3305). Also that *there was* "quite a heavy swell" (Tr., p. 3293).

We submit that if the Concord and Kaimiloa were doing considerable rising, surging and straining,—*and they were*,—(see Watkins, Tr., pp. 3304-5; Lowry, Tr., pp. 276-7; Weisbarth, Tr., pp. 571-3, 642; Miller, Tr., pp. 1424, 1428-30; Henry, Tr., p. 203; Brisco, Tr., pp. 348-9),—then, with boats of their vastly larger dimensions and displacement in comparison with the small shore boats used for this lightering, the swell *must* have been "considerable" for the small boats.

Referring back to the evidence heretofore reviewed relating to the kind of swells and their effect (see pages 10-18 of this brief), we now couple with it the evidence of the resulting danger to the Inter-Island boats and men.

In the opinion of men skilled in discharging of freight, and familiar with the conditions and possibilities attendant upon the *regular* work, the lightering done by the shore boats in the case of the Celtic Chief, was both difficult and dangerous; and more so than is the case in the Inter-Island work.

In her final position on the reef, which was practically the same during all of the Inter-Island lightering operations, the depth of the water appears from the following testimony:

Depth of Water:

Lonche: 16 or 18 feet (Tr., p. 568).

Haglund: 19 feet aft (Tr., p. 2907).

Piltz: Too shallow for boats to go safely around her bow (Tr., p. 2010).

Macaulay: 4½ fathoms when partly on (Tr., p. 2185) between 8 and 9 o'clock Sunday night (Tr., p. 2186). 19 feet at starboard quarter; 16 feet at bow (Tr., pp. 2193, 2196).

Henry: 3¼ fathoms all around (Tr., pp. 226, 250, 251). (Note: This is probably with reference to 8 p. m. Sunday as stated by Macaulay (Tr., pp. 2185-6), or 11:30 a. m. on Wednesday after lightering come. See Brisco (Tr., p. 330).

Lowry: (Same as Capt. Henry) (Tr., p. 281).

Brisco: 3¼ fathoms at 11:30 a. m. Wednesday (Tr., p. 330).

Schroeder: "Aft, amidships, and in the fore-part, were 19, 18 and 16 feet of water respectively" (Tr., p. 384).

And we have a judgment of the risk from one of the Ship's own witnesses, Lowry, who was asked (Tr., p. 278) :

"Q. Was there any danger to the Inter-Island boats used in lightering?

"A. *Yes, it was pretty risky work.*

"Q. How?

"A. The swell running alongside the ship and these small boats.

"Q. What danger was that?

"A. Well, there was the danger to the men in the boats; a sling of bags hanging over the side and the boat jumping about, and they had to land that sling into the boat and *it was pretty risky.*"

Capt. Piltz, for 18 years a mariner in all Pacific waters, from sailor to master (Tr., p. 1758), and with 10

years' experience in the Inter-Island trade (Tr., p. 1759), said this work "was done *under very difficult and dangerous conditions*" (Tr., p. 1797), on account of the swell.

Capt. Macaulay, with 42 years of sea experience all over the world, and for 29 years in Hawaiian waters (Tr., p. 2166), when asked if he thought there was any danger to the *boats* in these lightering operations, answered, "I certainly do" (Tr., p. 2284). Asked further if there was any danger to the *men* operating these boats, replied, "There certainly was" (Tr., p. 2285).

Of the same opinion was Capt. Haglund (Tr., p. 2981), he being also of large sea experience (Tr., pp. 2886-8).

It is well enough for a landsman, or even for Captain Henry and other seamen who know nothing of like work or conditions in these Islands, to compare the mere *size* of the swell seen out at the ship with swells seen over deep water, or where a boat is working from a *floating* vessel. We submit that their opinions are entitled to little weight as compared with those who are experienced, who took part in the Celtic Chief work, and who are better qualified to judge.

The Celtic Chief being stationary, fast to the bottom, the Ship did not have any "give" or elasticity in the water as has a vessel afloat. She could not rise or fall, nor tend forward and back *to any degree* with the small boats, and in consequence, the comparative rise and fall of the small boats and their surging back and forth, and other motions, resulted in a greater extreme

of motion for them in the case of this *fast* ship than prevails where the larger vessel is *floating* in *deep* water and takes *some* of the rise and fall and gives *some* under the onward pressure and receding motion of a large swell. In the words of Captain Piltz, a working boat lying alongside of a vessel afloat, *both* "have the range and the sway of the swell" (Tr., p. 1797). A floating vessel gives with the sea; when the boat is working at a stationary object (a wharf or landing for example, see Tr., pp. 2679-80) "the boat has to take the full swell and all of its force" (Tullett, Tr., p. 2680). Tullett says: "there is a great difference" (Tr., p. 2680). See also on this same point the further testimony of Tullett (Tr., pp. 2674-5, 2695-7), Piltz (Tr., p. 1961), and Nelson (Tr., p. 2786).

Another considerable difference, increasing the danger at the Celtic Chief, was the shallowness of the water. A swell may be considerably higher, in deep water, and be less dangerous, than a smaller one over shallow water. Over deep water there is very little incline to the forepart of a swell. But when a swell strikes shallow water, as the edge of a reef, it rises, and as the lower part of the motion is retarded by friction on the bottom, the top travels faster and so increases the forward incline until it becomes perpendicular, and then it "breaks" (Tr., pp. 2286, 2611-12, 2680). See also the opinion of the Court in the Chiusa Maru case, 3 U. S. Dist. Ct. Rep. 361, respecting swells on this same reef. It follows that if the swells were breaking at and just forward of the bow of the Celtic Chief during these

operations, the *incline* of the oncoming swell amidships at the Ship was considerably sharper than in any case of work over deep water. See also on this point, Piltz (Tr., pp. 1959-61).

In the words of Capt. Macaulay: "The stranded Ship was inside the line of breakers and the month was the month of December, liable for a heavy sea to run in there at any time" (Tr., p. 2284); and "*there is no warning given* to you when you are inside the breakers on the reef on the lee side of the Island of Oahu. There is no warning. The sea may be perfectly smooth. All at once, and all of a sudden a roller comes in there and curls over and breaks and if you're close to that breaker you're going to get capsized" (Tr., p. 2286). It is true that while the Ship lay there the breakers did not often break further out than her bow, but one big swell *did* break abreast of her forehatch (Tr., pp. 2679, 2727). Her position was within the edge of the first or outer reef, and on the edge of which the breakers do break in Southerly weather. The fact that the photographs referred to by the Court (Tr., p. 3350), show the swells breaking further in than the bow of the Ship, ought to be sufficient answer to the intimation heretofore made that these photographs were taken at the "most favorable" moments. (And see Tr., pp. 2727-28.) In a comparison with the Hamakua coast, which is unquestionably about the worst in the Islands for steamer boat work, Captain Macaulay says that all along there is very deep water, "and there are no sudden breakers," and "when the weather changes on the Hamakua

coast it gives you warning." We have already shown that during the Celtic Chief operations the weather was unsettled and southerly and liable to a change.

The men were accustomed to discharging freight "not exactly of that kind as existed at the Celtic Chief, but in the seaway alongside of steamers" (Haglund, Tr., p. 3077). Even in the regular Inter-Island work there are times when the work wouldn't be undertaken (Tr., pp. 2696-7).

The particular danger to the *boats* was their being broken by being banged against the vessel (Tr., p. 2674), or having a slingload go through the bottom (Tr., p. 2674), or capsized by the load getting on or under the gunwale (Tr., p. 2776), or swamped or capsized by the swell (Tr., p. 2286).

The particular danger to the men working in the boats was that a sling load would be hanging over their heads and with the boat surging back and forth they were in danger of being hit or injured by the load either hanging or dropping on them or the boat rising hard under it catching them between the boat and the load. Several of the men *did* actually get knocked over into the bottom of the boat. (Piltz, Tr., p. 1798; Tullett, Tr., p. 2674; Nelson, Tr., p. 2786).

In case of a boat capsizing the men were also in danger of being drowned (Tr., pp. 2285-6).

There is always danger in standing below a load of cargo (Macaulay, Tr., p. 2286), and in this case the danger, both to the men and boats, was increased on account of the inability of the Ship's winch, from lack

of power, to be used to pull up the burden fall in case it were necessary to lift the load to avoid a swell coming. With the winch used (as it was up to Wednesday noon), for both the main and after hatch, if the winch were at its alternate work of drawing a load from one hatch, it was not powerful enough for its *other* gypsy to be used at the same time to hold the burden fall and *hoist* on *that* if necessary (Haglund, Tr., pp. 2982, 2983). Consequently the burden fall (which is the rope used to slack down the load after its weight is thrown on the yard-arm for lowering), had to be *held* by taking a turn around a belaying pin at the rail, and the rope *paid out* to lower. This meant *slackening from* the pin, only to *lower*. It could not be raised. (Haglund, Tr., p. 2982; Fern, Tr., p. 2884; Nelson, Tr., p. 2786; Piltz, Tr., p. 2740.)

It had, therefore, to be let down slowly, "and that's where the danger came in" (Tr., p. 3079). On the other hand it couldn't be let down "in a second" because it might "break the boat and kill somebody" (Tr., pp. 3078-9).

In practical experience, in the Inter-Island work the burden fall is given a turn or two around the winch and so "can be lowered and lifted up very rapidly, and altogether much safer than it would be in this case out at the Celtic Chief" (Haglund, Tr., p. 2983).

Even after the donkey was brought out on the scow and used for the main hatch they couldn't even then use the yard-arm burden fall on the gypsy of the winch to raise a sling load if necessary because "the winch

was not powerful enough, not quick enough" (Haglund, Tr., pp. 2982, 2983-5).

Captain Piltz having testified that he saw men knocked down by the sling loads in these operations, counsel endeavored to have it admitted that "occasionally" in the Inter-Island work men in the boats are hit by sling loads and at the same time wanted only an affirmative answer that such a thing "has happened," and sought to prevent anything more being said by the witness (Tr., pp. 1868-70). However, on redirect examination his answer was completed, and with respect to relative frequency the witness said that in the regular work a man may be hit "probably in two weeks or once in three weeks, whereas out here one or two got struck in this operation the first two days." (Tr., p. 2741). And on page 1871 he said he hadn't seen it happen for about a year or so himself. He said further that although there is always danger of being hurt in the inter-island traffic, there is not as much as there was at the Celtic Chief (Tr., p. 1962).

These very dangers, specially existing here, prompted Haglund to give careful and particular warning to the men (Tr., pp. 3093-4),—a thing not ordinarily necessary. Bear in mind, also, that these men were themselves skilled in ordinary unloading work in the open sea; work which is itself often dangerous; almost certainly so with inexperienced hands.

Furthermore, the work was carried on at night as well, and it needs no argument to impress one with the fact that lantern light serves often only to accentuate

the darkness, and darkness certainly accentuated the danger in this case (Tr., pp. 2675, 1798, 2984). Distances or speed of slings cannot well be judged when one alternately faces a blinking light and darkness.

In matching his imaginative ingenuity against the practical experience and knowledge of Captain Piltz, counsel did not score in his effort to get some admission from Captain Piltz that the lightering operations were conducted in any impracticable way (See Tr., pp. 2007, 2020, 2025-28). The contrary fact was established that the work was done in the *most* practicable way—danger, all conditions, and need of speed all considered. (And see also Haglund, Tr., pp. 3075-80.) For the sake of rapidity of discharging, certain parts of the work were done under more dangerous conditions than would otherwise have been accepted. (See Haglund, Tr., pp. 3075-77-80, 3088; Tullett, 2725-7; Macaulay, 2608-9.)

The work was being pushed as rapidly as possible in order that the Ship would be lightened as much as possible before the midnight tide that night, when it was confidently expected that the Ship would come off.

The taking out of the 365 long tons by the Inter-Island Company allowed the Ship to float $12\frac{1}{2}$ inches higher (being at the rate of 4 inches for each 100 tons taken out (Lowry, Tr., p. 290). Captains Henry and Macaulay figured by the builder's scale that 40 tons out would raise the Ship two inches (Tr., p. 2296). Captain Miller took out 246 tons, which would allow a rise of about $8\frac{1}{2}$ inches.

Looking now to the fact that the Ship's floating draft was 20 feet 10 inches forward and 21 feet aft (Henry, Tr., p. 251), and that her depth in the water while aground was 19 feet aft and 16 feet forward (See page 59 of this brief), a rise of $12\frac{1}{2}$ inches plus $8\frac{1}{2}$ inches, or 21 inches, would practically float her stern, and the *pulling* to float her would only have to be enough to move a body of water equal in volume and weight to that still displaced by the forepart of the Ship to the depth yet required to float her. Captain Henry said the lightering lightened the ship "very considerably" (Henry, Tr., p. 252), giving her a rise of from 18 to 24 inches (Tr., p. 253).

It follows, then, that the combined lightering operations were of very great benefit to the Ship. The pulling off was of course just as necessary, but a much easier matter. Captain Macaulay and Captain Henry had it figured that at 6 P. M. Wednesday, if forty tons more cargo were thereafter taken out it would raise the Ship two inches (Tr., p. 2296) and this would give her a floating draft of 19 feet, approximately, at high water (Tr., p. 2296). Macaulay also said, "She seemed to get livelier as the tide rose." (Tr., p. 2298).

The vessel came off at 12:22 that night—before high water, which was at 1:12, according to the tide tables.

OPERATIONS OF INTER-ISLAND STEAMERS.

The Mauna Kea.

The Mauna Kea dropped her anchor off the port quarter and sent her line aboard the ship, the line being a brand new 12-inch manila hawser right out of the coil (Tr., pp. 2206, 1770). Parcelling (wrapping) was put on the mizzen mast and then the end of the Mauna Kea line was given two or three turns around the mizzen mast and then two half-hitches, leaving a long end (8 or 10 feet), which was lashed to the line itself, and the line was then parcelled in the port quarter chock. Thus made fast, "she started in to pull (Macaulay, Tr., pp. 2206, 2463). She also put out her anchor and got a strain on it (Tr., pp. 1927-8, 1938). Further using the testimony of Captain Macaulay, "she straightened out that hawser and pulled pretty hard. In fact, she pulled so hard that it closed up the two hatches, right close up to the mizzen mast and was rendering the original round turn(s), rendering them around and drawing them around until the long end that was lashed hauled up close to the mizzen mast and became a great bunch.

* * * The result was that the hawser broke in the quarter chock" (Tr., pp. 1551-2, 2206-7). This break was several hours after the Mauna Kea came (Tr. pp. 1552, 2207). And Kennedy (Tr., p. 779). To the question, "How did she do that?" this witness answered, "By actual pulling" * * * "The strain,

the actual strain, broke the line." (Tr., pp. 1552, 2207).

We here wish to emphasize the fact that this *first breaking* of the Mauna Kea line was *not* by a *jerk*, as it was the *second* time. Throughout the trial in court and in the testimony in depositions repeated statements are made that the Mauna Kea "broke her line" by jerking or steaming ahead suddenly on it. That is true of the *second* break, but not the first. Of the *first* break, Macaulay, on cross-examination again said "the Mauna Kea steamed ahead and strained at that hawser and *pulled a steady strain* and parted that line" (Tr., p. 2463). We quote here from him further that in this instance the line did *not* break immediately upon its being straightened out (Tr., p. 2463). He was emphatic that "she parted that line by a steady *pull*" of perhaps an hour (Tr., p. 2464). Counsel may be accepted as having shown by Captain Macaulay that possibly the Mauna Kea was carried nearer to the ship—a trifle at least—by the swell, and that it may have been due to the effects of that swell by causing the Mauna Kea to surge ahead, that the hawser broke" (Tr., p. 2471).

The *opinion* of the witness is, however, that "There was a perfect strain on that line." In any case the tendency of the swell to cause a pulling steamer to surge ahead is not questioned. It is part of our case. We contend that this tendency was in actual operation on all the steamers and that thus the theoretical and mathematical calculation of "effective thrust" of pro-

ellers becomes only a part—and a comparatively small part—of the actual pulling power of a steamer moving in a swell—and the heavier she is the more power. This we take up more particularly later.

On this line first breaking, Captain Macaulay goes on to say that a messenger was run and the line gotten on board the second time and a greater amount of parcelling and tying done, whereupon “she went ahead, it seemed to me, full speed * * * and she burst her line the second time and almost took the mizzen mast out of the Ship. She dented that steel mast. A person would not believe it unless they actually saw the dent in that steel mast; it formed a ring, and it left that mast in a condition that any surveyor would never allow that Ship to go to sea with that mizzen mast” (Tr., p. 2207; see also, Louche, pp. 500, 514; Lowry, p. 284). “I believe that the Mauna Kea broke the line the *second* time by a very quick and rapid pull, not a steady pull, but what wreckers call in salvage cases, a jump, jump her off” (Tr., p. 2208). This method, as an attempt along that line, was approved by the witness (Tr., p. 2209). Mr. Kennedy also approved it, the *steady* pulling not having moved her (Tr., p. 780). The dent made by the Mauna Kea in the steel mast was $1\frac{3}{4}$ inches deep (Lowry, Tr., p. 284).

The Mauna Kea, having broken her line the second time, again made fast and pulled until about 7 o'clock on Tuesday morning, when she passed her line to the Helene, which came out then and left the scene in

order to make her regular run with passengers and mail.

Appellants' counsel have intimated that on this appeal they were not disposed to challenge the findings of the trial court as to the pulling done by the Inter-Island vessels and by the Intrepid. We therefore gladly avail ourselves of the opportunity to shorten our brief, by largely omitting the quotations of evidence on these points; but, to preserve our general plan of making our brief serve the Court more or less as an index to the mass of evidence, we will nevertheless cite the pages where the testimony is to be found if reference is desired.

As to the position and condition of the Mauna Kea's line, etc., see Transcript pages as follows:

References to Mauna Kea Line:

Piltz: pp. 1770, 1772, 1874, 1876, 1877, 1878;
Macaulay: pp. 2206, 2464, 2466, 2468, 2470,
2471;
Henry: p. 126;
Lowry: p. 269.

See also the photograph in evidence as Exhibits I to N (Tr., pp. 2685-8), showing the Mauna Kea and Intrepid and a portion of the line of the Mauna Kea, and see also page 2905 of the transcript where Captain Haglund, looking at Exhibit J, said that about 400 feet of the Mauna Kea line is there shown. Note also, that the line is "practically straight" and is not touching the water, although made fast very low to the water at the Mauna Kea. Note also, that if 400

feet of the line is here shown (much more than half—and the lowest end at that) the *rest* of the line is also clear of the water.

Counsel for appellant have heretofore urged that the Mauna Kea having left the salvage operations before success was attained, its services theretofore rendered did not contribute to the safety of the Ship, and that the Ship's situation was no less dangerous situation than when the Mauna Kea arrived. This, we submit, is controverted by the evidence. The claim before the Court is not that of the particular vessels, but of the Inter-Island Company. If the Mauna Kea did good service while there, the substitution by the salvor of one vessel, or one tool or employee for another, in the course of its one continuing operation, justifies no conclusion that the *Mauna Kea* did nothing of merit worthy of reward, any more than a changing of captains, set of stevedores, or the like.

It is respectfully submitted, on behalf of the Mauna Kea, that even though she was obliged to leave the ship on Tuesday morning, her work formed a part of the continuous pulling on the same line; and also, in view of the fact that the Ship was in great danger of going broadside on Monday—evidenced, we think, by her moving further in in spite of the Mauna Kea's pulling, her motion might otherwise have been toward broadside.

Moreover, the record shows that the Mauna Kea stood the brunt of the added driving force of the swell against Miller's hulks, and, without that help, it can-

not be said that the Mauna Kea did not really stand between the Ship and her destruction at that time.

The Mauna Kea did not leave until she passed her line, *while pulling*, to the Helene, as we will presently show.

The Mikahala:

The first move of this vessel, on going out, was to steam out and drop her port anchor (Tr., p. 1764) about two points east of the stern of the Ship (Haglund, Tr., p. 2892) and back toward the Vessel, paying out anchor chain; then she sent her line aboard, a brand new 8-inch manila (Tr., pp. 1764, 2221), and by use of her winches then pulled up on her anchor chain until taut (Tr., p. 1765), by which time there remained out about 30 fathoms of chain in 5 fathoms of water (Tr., pp. 1765, 1863). Once connected and pulling, the Mikahala line was about 500 feet long. (Haglund, Tr., pp. 2902, 2222; Tullett, p. 2709).

The end of this line on the ship passed through the starboard quarter chock and made fast to bitts on the main deck (Tr., p. 2221) and on the Mikahal it was made fast through the starboard 'midship chock, and a "bridle" arranged—before any pulling was begun (Tr., p. 1768)—by attaching a 6-inch manila to the 8-inch line back beyond the stern of the steamer and taking it to and through the port 'midship chock, on the opposite side. The purpose of a bridle is "to have the pull on the middle of the ship (steamer) or to have a pull come from the center of gravity, and also to be able to maneuver the ship whatever side you

wanted to carry her, by slackening on the offside one to allow the pull to come on the side you wanted to turn" (Tr., p. 1766). "As soon as we had the line fast the Mikahala started to pull" Macaulay, Tr., p. 2221). Her position while pulling (until near the last) was about three points off the stern of the Ship (Tr., p. 2222). Witness Dowsett added to this that (as *he knew*) the bridle enables a boat to do towing and hold herself in position and *answer her helm* and at the same time not have difficulty with the towing lines (Tr., p. 2158).

With the exception of two short stops (Tr., p. 1767), one of about 20 minutes, on Wednesday morning at 7 A. M., to run a second and separate new 8-inch hawser (Tr., pp. 1767, 2906, 1871-2, 2718) from her port 'midship chock to the Ship (Tr., pp. 1767, 1768, 1872), run the same bitts on the Ship (Tr., p. 1872) and another time at about 7:30 or 8 o'clock Wednesday evening to allow her two lines to be parcelled where crossed by one of the Arcona wires (Tr., p. 1785), the pulling by the Mikahala was continuous (Tr., p. 1767), with variations at times to the extent of using "reduced speed" at low water (Tr., p. 1767).

With respect to the Mikahala's pulling prior to Wednesday night, see the following references:

Macaulay: Tr., p. 222;
Tullett: Tr., pp. 2717, 2662, 2716;
Ekau: Tr., p. 1240.

Against this we have nothing but the brief general statements of the witnesses for the Ship, as follows:

Captain Henry: "Well, there was not a great deal of strain on it; it was in the water most of the time. * * * Well, you *could not put it down* the same as you could the towboat's lines, but you could get a bit of slack on it" (Tr., p. 126).

Commenting on this, we say that no particular time is mentioned, but it apparently relates only to Monday or Tuesday, because there was more than one line on Wednesday. Also, it does not appear whether he made his tests during high or low water.

Lowry: "There was a weight on the *Mikahala's* line, but nothing very extraordinary." He could press it down three or four inches, but not to the deck. "There was a *slight bight* in that one" (Tr., pp. 269-70).

Now a word about the statements of Captain Henry and Lowry that they "tested" the strain on the lines of the *Mikahala* (and the *Likelike* as well) by "putting them down" with their feet. We will give them the benefit of the possibility of doubt that in so testifying they were saying what they *thought* they could do, or they have become confused with some of the other lines. If their statements are to be taken as meant for actual tests with their feet on these lines, we submit the statements are entitled to very little credit. They could not have done any such thing. In the first place, none of the lines of the *Mikahala* or *Likelike* ran over or across any part of the deck. They came through the quarter chocks on either side of the Ship, and the bitts for these chocks are close to the chock openings on the very edge of the main deck. As to the *Mikahala* lines

on this point see the testimony pages 2221, 1766, 1872; Henry, 120; and as to the Likelike line see the testimony on pages 2227-8, 1784; Henry, 121.

The least familiarity with positions of lines in towing operations would be sufficient to assure anyone that a line made fast to bitts, right down on the deck, would doubtless, on account of the inevitable outside sag of lines of such weight and length, come within one or two inches, at most, of touching, or would actually touch, the outside edge of the open chock, if not altogether rest upon it, even heavily, because of the strain.

It is respectfully submitted that the testimony of foot tests by these witnesses is either under some mistake, or is theoretical, or false. The *Helene's* line, coming from the mizzen mast, where it was fast about 12 inches above the poop deck (see the photograph) ran thence to the edge of the poop deck and there rested on it as it left the Ship, the chock having been torn away when the Mauna Kea line parted. As to that line, of course, it could be put down by the foot to the deck if one went very close to where it rested *on* the deck.

With special reference to the Mikahala's strain on Wednesday night, aside from her maneuvers, which will be hereafter discussed, the following citations to testimony are made:

Kennedy: Tr., pp. 763, 773, 788, 791, 793, 797;
Piltz: Tr., p. 2065;

Dowsett: Tr., pp. 2095, 2097-8, 2134, 2157,
2160-1;

Tullett: Tr., pp. 2662, 2663, 2830;
Macaulay: Tr., pp. 2293-4.

Even Miller said that the Mikahala was pulling, and the other lines were slack (Tr., pp. 1654-5), but it is evident, on comparing the *time*, that this was just the point where the Mikahala was making her special side pull and the others were slacked for the cutting.

The testimony of the engineers of the Mikahala also covers the point of speed being made that night. The first watch, from 6 to 12 P. M., was that of Devlin, chief engineer (Tr., p. 2862), and he remembered "going ahead on her full speed at 11:30 P. M. and prior to that time they were going at "reduced speed," meaning about three-quarters (Tr., p. 2862), since 7 P. M. (Tr., p. 2126), and when he left his watch at 12 midnight "I was running her full speed ahead" (Tr., p. 2864). He knows further that even after that there was no change until she was eased up about 12:22 or 12:23 (Tr., p. 2865). The first assistant engineer, Christiansen (Tr., p. 2742) had the watch beginning at 12 midnight (Tr., p. 2742), at which time, on going in, he saw that "the engine was going full speed." He "examined the engine and saw that the throttle was open and looking on the steam saw it had the proper amount of pressure on the engine" (Tr., p. 2743). By consent, the record of times and speeds of the Mikahala, from midnight on, was read in evidence (Tr., p. 2746), from which it appears that the first change from full speed was at 12:22, when it ran slow for exactly one minute, and then full speed again until 12:25, when

there was a full stop. At 12:27 full speed ahead again, and 12:28 stopped. We point further to the further testimony that between 12 and 12:22 the engine began going a little faster, that is, making more revolutions per minute (Tr., pp. 2746-7), which, in the case of a pulling vessel increasing her revolutions indicates that the steamer is going forward, as the less resistance allows more revolutions with the same speed (Tr., pp. 2748-9). The application of this evidence is that the Mikahala was pulling full speed on the Ship at the time the Ship began coming off—which was between 12 and 12:22. It follows further that her lines could not have been anything but “as taut as the Mikahala could make them.”

This principle of increase of revolutions, with the decrease of slip, in the case of a vessel pulling on a stationary object, is further elucidated by other engineers. (See Faneuf, Tr., pp. 2761-64; Strohlin, p. 2796.)

There is no evidence at all from any witnesses from the Ship, that the Mikahala was not pulling hard that night. The further maneuvers of the Mikahala, other than pulling, toward the end of the operations, will be separately presented in connection with the manner in which the Ship came off. Altogether the Mikahala pulled about 60 or 61 hours (Tr., p. 1767).

The Helene.

We now similarly refer to the testimony bearing on the maneuvers and pulling done by the Helene.

... The Helene left her wharf at 6:30 Tuesday morn-

ing (Tr., p. 2889) and took the 12-inch hawser of the Mauna Kea on Tuesday morning at 7 A. M. (Tr., pp. 2889, 2771-2), the method of transfer being: A 7-inch line of the Helene was made fast to the 12-inch line, back of the Mauna Kea, whereupon the Mauna Kea hove up her anchor and went back. The Helene then slacked out the full length of the 7-inch line and steamed out and laid first her starboard anchor and then proceeded further and laid her port anchor (Nelson, Tr., pp. 2772, 2801), and then hauled back by means of the 7-inch line to within 20 or 30 feet of the end of the 12-inch line the Mauna Kea had left, and then put out two other parts of the 7-inch line through a "thimble," forming a bridle (Tr., p. 2891) and made all three ends fast to the Helene, taking them either side and parcelling them (Tr., p. 2772). Reference to the photograph, Libellant's Exhibit L, will show the way the line was held by the Helene. By "about eight o'clock we were all ready" (Tr., pp. 2772, 3023).

When she was moored and fast in her final position which she maintained during her pulling, until the Ship began to come off) her distance was just 635 feet from the Celtic Chief (Haglund, Tr., p. 2891; Nelson, p. 2775). Each of her anchors weighed 2,000 pounds (Tr., pp. 2772, 2965), her anchor chains being 1½-inch (Tr., p. 2892). Her starboard anchor had but 90 fathoms of chain, and her port anchor about 60 fathoms (Tr., pp. 2772-3, 2892), the two anchor chains leading out from the Helene forward and about two or three points apart (Tr., pp. 2891, 3143). A "point,"

in marine technology, is $11\frac{1}{2}$ degrees (Tr., pp. 2694, 3142).

Unlike the Mikahala, whose anchor was put out principally to maintain her own position (Haglund, Tr., pp. 2895-6; Tullett, p. 2661; Piltz, p. 1863), the Helene placed her anchors for the express purpose of making her operate as a mooring for the ship, and to heave on her anchor chains in addition to pulling by her propeller. "In this case that (those) anchors wasn't laid out in that position, Mr. Olson, to hold the Helene; it was placed there for the purpose of holding the Celtic Chief from going on" (Haglund, Tr., pp. 3066, 2895).

Here directing attention particularly to the anchors of the Helene, we point out that Captain Haglund, the superintendent of the Inter-Island Company and in charge of its operations at this stranded vessel, had the Helene anchors thus laid as far as possible from the ship and as directly astern as could be done under the circumstances. The advantage of distance is "The greater the distance, of course, the better hold and more purchase you can get before you drag home" (Tr., p. 2894). Speaking of the Helene's anchors, Captain Piltz testified they were "right astern of the Celtic Chief and right ahead of her naturally, well straight ahead of the Helene" (Tr., p. 1786). He also considered they were "quite a ways out" (Tr., pp. 1774, 1954). The Helene's port anchor was about half a point west of a line dead astern of the ship (Tr., pp. 3141-2). The object was "to put an extra strain on the line; to obtain all the extra pulling power we could get by means of the

winches" (Nelson, Tr., p. 2775). "Big anchors come home where small ones would not on account of being laid farther out"—the bottom being exactly the same as far as known in the case of the Transport Sheridan, according to Captain Haglund's own observation (Haglund, Tr., pp. 2972, 2975). From long practical experience Captain Haglund further tells us: "The further the anchor is away, the smaller the angle will be to the object, and there will be a better hold. An anchor directly down from the ship, even if it were *ten* tons, would not have the same effect as an anchor lying a hundred fathoms away weighing one ton; "that would hold this ship better than an anchor lying close by weighing twenty tons" (Tr., pp. 2966-7; and see p. 3162).

Captain Macaulay says also, concerning his experience in judging weight and effectiveness of anchors: "I can pretty nearly tell how much chain it will take to hold the ship under a certain pressure, when taking into consideration the holding ground in that locality" (depending on the bottom), and the advantage of more chain is that "*There is more weight and it makes a difference in the angle.*" (Tr., p. 2173; and see p. 2976).

Captain Haglund ascribed the difference in power of the Helene over the others as due to a greater pulling power or engine power as well as having her anchors out forward *and using her winches* (Tr., p. 3159)—exerting a pull on her anchors and thereby transporting the strain to her stern lines (Tr., p. 3159).

We will here digress to discuss a comparison made by Captain Haglund of the holding power of the Helene's anchors and that of the Miller anchor, as the testimony in this connection goes further to show the Helene's holding power and the added strain on her lines on account of the use of her anchors and steam donkey. This witness having testified to the advantage of distance as making a less angle to the bottom, and the relative value of heavy anchors near and lighter ones farther out (see above), a question was put to him (Tr., pp. 2966-7) calling for a comparison in holding power between the Helene's anchors and the Miller anchor, weight, distance, etc., considered. Opposite counsel, wishing to prevent the witness being permitted to answer this question, undertook to cross-examine as to qualifications, with the result that the answer was brought out completely and made any further questions on direct unnecessary; the answer being that the Helene's anchors had an advantage over the Miller anchor on account of distance (Tr., p. 2976), and the witness repeated "they certainly would" when the matter of comparative depths of water and elevation of ship's decks, etc., were further particularly mentioned (Tr., p. 2977).

Direct examination having been resumed, the witness was asked *why* the Helen's anchors would have that advantage, and we have, in testimony which we condense from various portions of the examination, both direct and recross, the following reasons from the witness:

In distance from the Ship, the Miller anchor was approximately 670 feet seaward of the Ship (see exact calculation of this by Haglund, Tr., pp. 3063-5 and 2977), and the port anchor of the Helene was 1,165 feet out (Tr., p. 3142); and the starboard anchor being 90 fathoms (the port being 60) was 180 feet further still, or 1,345 feet—about twice as far from the ship as the Miller anchor (Tr., p. 2978).

The depth of water where the Miller anchor lay was about five fathoms (Tr., pp., 3066, 2976), and where the Helene port anchor lay about six fathoms, and her starboard anchor about seven or a little less (Tr., p. 3143), between six and seven (Tr., pp. 2976, 3066). Given in *feet*, the starboard anchor was about 30 feet below sea level and the port anchor about 21 feet (Tr., p. 3144). As the depth of water under the Helene was also about five fathoms (Tr., p. 3065), the plane or incline of the bottom from the Helene's starboard anchor to the 5-fathom depth (where Miller's anchor was and the Helene lay) was, say, at the most 12 feet in a distance of 540 feet (90 fathoms), or a grade of about 2.4 per cent.

The point where Miller's line went over the stern of the Ship was about 35 or 40 feet above sea bottom there (Tr., pp. 3065, 2977).

The height of the Helene's bow where her anchor chains ran out was about 10 feet above water (Tr., p. 3064) and the depth of water there being 5 fathoms, the distance from her bow to the bottom there was about 40 feet (Tr., p. 3064). The height of the lower deck

of the Helene where the manila hawser came from the Celtic Chief into the hawsepipes of the Helene was only six feet above water (Tr., p. 3216).

The Helene's anchor chains weighed about 128 or 129 pounds to the fathom (Tr., p. 3066), which (at 128) would make 11,520 pounds of chain for the starboard anchor and 7,680 pounds of chain for the port anchor, or 19,200 pounds for the two chains together, or 9.6 tons; and this, added to a ton for each of her anchors, would give her approximately a weight of 11.06 tons out ahead of her (And see Tr., p. 2978).

Captain Haglund could not give the weight of the Miller wire per fathom or foot, and was not altogether sure of its size (Tr., p. 3072), but he had an approximate idea of it, sufficient, in his own mind, to make at least a general comparison of the two separate contrivances as a whole. As a matter of fact, the weight of the Miller wire could not begin to equal that of an inch and a half chain, by which is meant that the link, if cut and straightened out, would be one and a half inches thick, the link itself being about four or five inches across (Tr., p. 3073), and its opposite sides separated by a cross-bar of the same thickness (Tr., p. 3073). The chain, if laid out in bars, would be equal to two portions each an inch and a half in diameter, or totaling 3 inches for the two, which would equal 9.42 inches circumference, and its comparative tensile strength and weight added to by the cross-bar inside each link.

With these facts and figures in his mind; Captain Haglund testified as he did in the comparison of the holding power of the Miller and Helene anchors. On cross-examination counsel directed the witness how to draw, in detail, a sketch of the sea bottom, depths, and certain angles by the drawing of certain lines in manner as *he* wanted them, *but not as the witness maintained they should be*, to show the *real angles* to the bottom formed by the respective lines from the anchors. The sketch obtained is in no sense representative of the witness' opinion or testimony concerning these angles, because it excludes factors which the witness insists did form part of the actual conditions in operation. We point out here that *counsel*, through the witness, thus drew a straight line from the bow of the Helene to her anchor on the bottom to represent the Helene's anchor line, and insisted that the angle formed by *that* line with the bottom was the angle to be used in comparison with the Miller angle. (See Tr., pp. 3069, 3070-72.) Of course, the witness could only answer in the affirmative the questions which were then based upon the *hypothetical* drawing, such as that on page 3071, namely: "Now then, Captain, in so far as the anchor is concerned in each case the angle of a line from the anchor itself, from the Miller anchor to the Celtic Chief, is somewhat smaller than the angle formed by a *straight line* from the Helene's starboard anchor *to the Helene's bow*, isn't that true?" The affirmative answer seemed so valuable to counsel that he sought to have it repeated, for which purpose he repeated the

same question, and the witness answered this time that it would be so "*providing the chain would be held as taut as a wire*" (Tr., p. 3072). As a matter of fact, the Miller wire could be drawn far more in a straight line, if made taut, than anchor chains could be. The question was not a fair one, on the facts, and was put with design to prevent anything but an affirmative answer to it in that form. Another question, equally distant from the facts and devoid of a fair opportunity then given the witness to give a true answer consistently with the facts in the case, follows on page 3072, when he asked: "Now, the purchase that the *Helene*'s anchor would get by virtue of the angle, *aside from the question of the weight of the anchor chain*, would not be any greater or better than that of the Miller anchor, would it, *aside, I say, from the weight of the anchor chain?*" The answer wasn't satisfactory to the questioner, either.

Counsel did not really *want* any opinions from this witness about comparative holding powers and objected to anything but "yes" or "no" answers. For example, again, see Tr., pp. 2971-74.

On cross-examination by counsel for Miller Salvage Company, Captain Haglund said that if there was "a straight line drawn from the *Celtic Chief* to the *Helene*'s anchor the angle would be smaller," and that would be *one* of the reasons why the holding power was greater. Size of anchors would have a great deal to do with it "if they lay in the same place." "It all depends what cables there are on her. If they had a

similar chain, similar weight on the chain, similar distance, under similar conditions of bottom, then the greater weight would have the best hold, but under those conditions at the *Celtic Chief* the *Helene* anchor was twice as far from the *Celtic Chief* as the *Miller* anchor; *Helene* had a greater weight out" (Tr., pp. 3160-61). And she had *11.6 tons*, besides double the distance. As a matter of fact, in view of the weight of the *Helene*'s anchor chain, the witness said "the chain formed *no* angle to the bottom" (Tr., p. 3160), the chain being really lying flat on and along the bottom for some distance from the anchor (See Tr., pp. 2978-9). But a wire, under water, even if drawn taut, would form at least a small angle.

Now, coming back to the sketch drawn by counsel through the witness, the witness was asked on re-direct examination, "what elements or factors do you take into consideration to determine what would be the angle formed by an anchor line or chain with the bottom," to which the witness replied: "The factors to be considered in this would be the distance and the weight of the cables from the object it was fast to" (Tr., p. 3202). The witness was then further asked, with respect to counsel's sketch produced through the pencil held by the witness, "Between what points would you indicate a line should be drawn to ascertain the real angle formed even *on a straight line theory* with the bottom by the *Helene* anchor chain?" (Tr., p. 3202), and the reply was, "It should have been drawn *from the stern of the Celtic Chief to the Helene's anchor*, as well

(meaning in the same way) as the straight line from the Celtic Chief to the Miller anchor. The Helene is merely acting as a buoy to the connection between the Celtic Chief and her anchor here on that angle" (Tr., p. 3204). The witness then drew in red ink a line to indicate his own opinion and testimony on the subject of the proper angle. In no other respect does the exhibit in question bear out any testimony of the witness as to angles for the Helene anchor.

On still further cross-examination Captain Haglund replied positively that a straight line drawn from the Helene's anchor to the stern of the ship would *not* run under the Helene, the sketch (and red line) being inaccurate, the map having been drawn only roughly—scale or no scale by the *ruler* used—and he maintained this as his real and only opinion (Tr., pp. 3218-19). We add that we have ourselves made a large scale drawing of the small sketch in evidence, and find that the straight red line really passes through the lower part of the Helene's bottom near the stern.

Even Libellee's own witness, Lowry, says that if the pulling vessels had their anchors down, "then it would be practically the same thing as Captain Miller's anchor" (Tr., p. 310); saying also that although he had testified that the best means of getting a vessel off a reef is by an anchor astern, "the same principle applies to a ship that has both her anchors down and heaving on them—it is the same thing" (Tr., p. 318). See also: Lonche: "Having an anchor over the bow of the steamers pulling would have the same effect" (Tr., p. 499).

Add to this the fact that the horse-power of the Helene's steam winch was about 45 (Haglund, Tr., p. 3115), which could be utilized directly on the anchor chains and was consequently resolved into that much actual pull on the Ship in addition to anchor and propeller power.

And there is still another factor of force where a vessel is both pulling and heaving on her anchors—that of the lateral power exerted on the line by the vessel being considerably lifted by the swell, tending to draw the ends toward each other in consequence of the center being displaced. See the allusion of Captain Haglund, page 3203, to the Helene acting as a buoy or weight on the bight. Also page 3212. As there would be some downward bight in the line as a whole, the tendency of the swell to raise the vessel would, in the first instance, enable a few links to be taken in on the chain until no more could be had that way, and then the pull would react on the ship ashore. See, on page 3169, the question: "What was there that would add to her power, pull, in the condition of the sea that prevailed about the Celtic Chief?"—and the answer: "The way the ship (Likewise) moved up in the bight that existed between the Celtic Chief and her anchor"—the rise and fall—of the ship (Likewise) itself. Also the further testimony that the added force so given would depend upon the amount of rise and fall, which was sometimes as much as 15 or 16 feet and more (Tr., p. 3169). "At the time she raised up it would be greater strain" (Tr.,

p. 3170). It might even be great enough to part the line (Tr., pp. 2431-2).

We refer also, for yet another element of power, to the practical force given by the towing steamer working in the swell, this subject being separately presented under the head of the general pulling of all the steamers.

Therefore, it will be apparent from the testimony as a whole with respect to the strain on the *Helene* hawser, she was able to remove all question of any material bight in her line (being thus different from where the anchor chains are not used for heaving) and able at times to make her line "perfectly taut," "straight out," "through the air" (Tr., p. 2716). And although the *Mikahala*'s lines were "taut" (Tr., p. 2716), they were "not as taut as fiddle strings" because her anchor *did not have* "to hold in the same strain that the *Helene* and *Likelike* did" (Tullett, Tr., p. 2716). Captain Tullett was prepared to say that "the *Helene* and the *Likelike* by means of their anchors were able to bring their lines out straight in the air like fiddle strings" (Tr., p. 2716).

The *Helene* used her "*steam engine*" (Tr., p. 2800) on each anchor chain, taking in a link every time it could be gotten (Nelson, Tr., pp. 2775, 2801-11; Haglund, p. 3025), and we submit it is clear that if only one link or two could be gotten from time to time, with a 45 horse-power steam donkey (Tr., p. 3115) the strain certainly must have been great and the bight practically eliminated if "*just one more link*"—6 to 8 inches—

could not be gotten on an entire line from the Ship to the anchor of about 1,345 feet. In the opinion of WeisbARTH, there was enough anchor chain out to enable the steamers "to hold whatever they made" (Tr., pp. 714-15).

Other references to testimony of the strain on the Helene's line, prior to the final pull on Wednesday night, are the following:

Nelson: Tr., pp. 2773, 2820.

Henry: Tr., p. 127 (And we think we may say, in view of Capt. Henry's testimony as a whole, that the "times" when there was *not* a "good bit of a strain" were at low water).

Lowry: Tr., p. 270 (Lowry's foot-testing of this line should be considered in the light of the fact that the chock had been torn away by the Mauna Kea's line, and the line therefore lay flat down on and along the deck at the poop where it went over).

Haglund: Tr., pp. 3023, 3214, 3215, 3217, 2926.

Capt. Macaulay did not testify as to the Helene line apart from the others (and did *not* testify as counsel represented to Nelson on Tr., p. 2811), and his testimony is therefore cited below as to the pulling collectively.

Capt. Nelson thought that the Helene line could not have been brought out of the water even with her pulling at full speed or heaving in on her anchor chains (Tr., p. 2812), and if others testified that she could they were wrong in his judgment.

We submit, as to this testimony, that it does not tally with the weight of the rest, nor with the actual photograph of the Helene line shown by Libellant's Exhibit

L, which, shown to Capt. Haglund, the latter testified that at least 200 to 250 feet of her line are there shown (Tr., p. 2906); and we think that in view of the fact that the line was lower at the Helene end, 6 feet above water as against 19 at the Ship, the worst of the bight is shown in the photograph, and if the line were touching the water at all it would have done it inside the range shown by the picture. It is also inconsistent with his testimony on Tr., p. 2773.

Counsel having heretofore argued* that the Helene was not using her propellers when the Ship came off, citing Tr., p. 2831, we submit that the witness clearly meant that *after* she was off they stopped the engine, and later went ahead after her line had been cut. The following further testimony will make this clear:

Tullett: Observed the lines of the Helene and Likelike "practically all the time," and they were "perfectly tight" (Tr., pp. 2662-3).

Nelson: "We didn't start to pull full speed until towards eleven o'clock on Wednesday night when it was approaching high tide," and having then started full speed we "continued at full speed until the vessel began to move, until she came off clear of the land" (Tr., p. 2774). He knows he gave the signal to the engineer for full speed (Tr., pp. 2798-9), and that the speed was immediately increased (Tr., p. 2799).

And the windlass of the Helene *was used*, heaving on her anchor chains Wednesday night (Nelson, Tr., pp. 2802-2811; Haglund, Tr., p. 2894), and it was "a sort of continuous operation after about ten minutes, five or

*And still so argue in their brief, p. 95.

ten minutes before twelve" (Tr., p. 2807), * * * as fast as we could get in the chain. It was a continuous occasion" (Tr., p. 2808).

The testimony of Lycett, the engineer of the *Helene*, is also conclusive on the point of her pulling on Wednesday night. As chief engineer his watch that night was from 8 to 12 (Tr., p. 2853). Independently of the log, and without looking at it at all, he remembered that the engine was "going full speed from about eleven o'clock until she came off;" and although there were variations before eleven o'clock,—"from eleven o'clock on we had full speed," and she came off at 12:22 (Lycett, Tr., pp. 2854-5).

Although Lycett's watch ended at 12 o'clock that night he went from the engine room up on deck right next to the skylight over the engine room, and from there was watching and hearing the engines all the time, and his answers are positive that there was no change of the engine until the Ship was off (Tr., p. 2855). Had there been any change of throttle he would have noticed it, not only by the sound, but he could see the throttle from his position above (Tr., p. 2857).

We offered the log in order that the entries for the watch following 12 o'clock might be admitted, in the absence from the Territory of Reid the engineer, who had that watch (Tr., p. 2857), but our case was inadvertently closed without it having been marked except for identification. It is immaterial, however, as Lycett himself testified personally, all of his own knowledge and independently of the log, as to the whole time up

to the Ship coming off. Lycett further testified that prior to eleven o'clock the speed was three-quarters, but there were no stops made in his watch (Tr., pp. 2857-8), the stop having been around *noon* of that day (Tr., p. 2858).

The Likelike:

The Likelike came out a little before noon on Wednesday (Tr., pp. 1784, 2814, 3021, 121), and by noon had laid her anchor about two points on the port quarter of the Ship, astern (Tr., p. 3165), ahead of herself, and passed an 8-inch Manila hawser (Tr., pp. 3158, 121), to the Ship, which was made fast through the port quarter hawse pipe to the main deck bitts (Tr., pp. 1784, 2228, 121). A bowline was then run from the Likelike to the starboard side of the Helene, and the Likelike hove up closer to the Helene, bringing the Likelike up to and possibly a little to eastward of her own line with her anchor, this having been done to avoid the current, the Helene being the larger vessel (Tr., p. 3165). The effect of this maneuver was to get the Likelike in a position where her power would be affected by the swell as little as possible, thus increasing her power as a pulling agent. It also added to the side pull or weight on the Helene line. Then the Likelike hove her anchor chain as taut as they could get it (Haglund, Tr. p. 3166). Capt. Haglund both saw the position of the anchor chain and heard the heaving on it (Tr., p. 3166).

See also Capt. Macaulay's sketch showing the Likelike anchor (Libellant's Exhibit G).

As to pulling by the Likelike before the night pull, see:

Tullett: Tr., pp. 2716, 2663;
 Haglund: Tr., pp. 3156-7, 3164, 3168-70;
 Henry: Tr., p. 127;
 Lowry: Tr., p. 271.

To this we say that if there was a "slight bight" only, the line was *remarkably taut*.

With regard to "testing" of the Likelike's lines by Captain Henry and Lowry, we refer back to our remarks on this subject with respect to their testing the Mikahala's lines. The Likelike line was taken through the port quarter hawse pipe and made fast to the bitts *right there* (Macaulay, Tr., p. 2228; Henry, Tr., p. 121). It follows that they were not where they could be pressed down to the deck, any more than the Mikahala lines could have been.

Haglund also refers to the rise and fall of the Likelike as adding to her power, as already noted above (Tr., pp. 3168-70). This strain was being exerted by her "during all the time she was going full speed" (Tr., p. 3170).

Note also the photograph (Libellant's Exhibit L), showing the Likelike line. Capt. Haglund said of this photograph that the Helene's line there shown is about 200 to 250 feet long, and "the Likelike line shows a bit longer" (Tr., p. 2906). Manifestly it showed longer because viewed at a more acute angle. Hence about

half her line is there shown *out of the water*, her whole line being 575 or 580 feet long (Haglund, Tr., p. 2907).

The night pulling by the Likelike appears as follows:

Haglund: Tr., p. 3170;

Faneuf: Tr., pp. 2757-59;

Strohlin: Tr., pp. 2757, 2794, 2795, 2796.

Strohlin then proceeded to describe the "speeding up" and explained its meaning (Tr., pp. 2796-7), as heretofore already indicated in this brief, meaning the Likelike had begun to move forward in her pulling, and hence that she was *pulling* at full speed when the ship came off.

Having now reviewed the testimony especially relating to the pulling by the steamers separately, we indicate the following general testimony covering their pulling and strains taken as a combined power on Wednesday night:

Lonche: Tr., p. 617;

Kennedy: Tr., p. 761 (at nine o'clock), 761, 763, 773 (later);

Bray: Tr., p. 858;

Piltz: Tr., p. 1783;

Macaulay: Tr., pp. 2293-4, 2299-2300-2301, 2317, 2516, 2576.

As to the testimony of several witnesses in the case not cited above on the subject of pulling and strains by the steamers, we have to say that they did not in fact have knowledge sufficient to make their opinions or even their impressions of any value, because upon their own statements they did not observe and could not have known. See the following:

Capt. Henry: As this witness *did* express opinions, we will first quote and then discuss them:

Asked if, as a result of the second red light being put up he noticed anything with regard to the Inter-Island lines, he replied: "No, I did not" (Tr., p. 221). Read this in connection with what he said on page 224, Transcript: "Well, as I said before, there was times when the line was in the water and times when it was out of the water. I never saw any difference with their hawsers whether the lights were up or not;"—and we have *no statement* that they were *not pulling*.

Take his answer above quoted that he did not "notice" any change after the second red light went up, and then his answer,—when asked: "When you had those two red lights up to pull ahead, were they not pulling?"—"I don't know; they were the same as before when the red lights were not up," (see page 225, Transcript), and couple it with the last answer there immediately preceding, (relating to the time before the second light was up): "At times they were "taut" and at times they were not"—and, we submit there is nothing here on which to base any claim that Capt. Henry has testified that the steamers were not pulling. He admits that "at times they were taut and at times they were not,"—both before and after and at all times during the operations. Aside from his saying of each of the separate steamer lines that "it had a good bit of strain on it too, but at times there was not;" (Helene, Tr., p. 127), or "you could not put it down * * * but you could get a bit of slack out of it;" (Mikahala, Tr., p. 126); or, as to the Likelike, and all of them: "If there was a good

strain they would have been out of the water (Tr., p. 127),—we submit there is no testimony at all of what he *knew* or opined.

What Captain Henry *didn't know*, is evidenced by the following:

He had admitted that he could observe those lines as they came aboard his Ship, and could observe their condition, and was then asked:

“Q. That told you whether there was power exerted, didn't it?

“A. Well, it would, yes.

“Q. Well, on Tuesday night were not those vessels exerting power on your vessel?

“A. Yes, to some extent.

“Q. Well, how much?

“A. *I cannot tell.*

“Q. Well, a little power or a great deal of power?

“A. *I do not know what power they had on; I could not say how much power they had on*” (Tr., p. 225).

“Q. Well, did you not notice those lines all the time?

“A. *No, not all the time*” (Tr., p. 184).

“Well, the lights were there for them to pull, but *I don't know whether they pulled or not*” (Tr., p. 224).

“Q. Who was pulling on the Celtic Chief *at the time she began moving and until she came off*?

“A. There was the cruiser Arcona and Capt. Miller taking in the slack of his line from the anchor and the three tugs from the Inter-Island.

“Q. The three steamers you mean?

“A. Yes, three steamers rather.

“Q. *Did you observe the lines of the Inter-Island boats?*

"A. *No, I did not observe them at that time*" (Tr., p. 141).

"At that time" means during the whole period from the time the Ship began *and until* she came off. This more clearly appears from the next quotation:

"After the *search-lights were turned on*, on the evening of December 8th, *did you notice the lines* attached to the Mikahala, the Helene, and the Likelike?

"A. *Well, I did notice them but I did not take much notice of them.*

"Q. *Well, round about eleven o'clock, was there a strain upon those lines at that time?*

"A. *I could not say.*

"Q. *You don't know?*

"A. *No, I could not say.*" (See page 198, Transcript.)

Lowry didn't know:

Lowry slept from 10 o'clock until 11:30 (Lowry, Tr., pp. 274-5). At 11:30 he came on deck again and went forward (Tr., p. 212), and from 11:30 o'clock was on the forecastle (Tr., pp. 288, 275).

Add to this the following:

"Q. What was the condition of affairs when you came out again at half past eleven o'clock, after you had your sleep?

"A. They were preparing to make a hard pull with all the tugs. *But I didn't know*; I went away forward to stand by the anchor; we expected her to go off then.

"Q. Do you know how much of a strain there was on the various lines from the time she began to move until the time she came off?

"A. No, I was forward then and I don't know anything about what happened aft" (Tr., p. 275).

What, then, we ask, is the value of any of the testimony of Lowry of how he "tested" the lines,—all of which was before 10 o'clock, when he went off to sleep?

Lonche didn't know:

His testimony on pages 513-15, Transcript, shows that his idea that the steamers were "only pulling half speed" was based on his understanding that there was an arrangement that they would not pull beyond half speed until the light went up, and he said elsewhere that the second red light did not go up until the Ship was off. He admitted that he did not know of his own knowledge at all.

He knew there was a maze of lines: "There was not a chock aboard the Ship but what there was a wire on there barring the one amidships.

"Q. You really didn't know definitely to what vessels the different lines belonged?

"A. No, sir, barring the one, the one on the starboard side, * * *

"Q. You wouldn't venture to say anything about any other wire, as to what ship it belonged, what steamer?

"A. Hardly, sir" (Tr., p. 552).

Weisbarth didn't know:

He did not go on the poop until the lieutenant did, at which time the Ship was already actually afloat, and he then saw all of the lines slack in the water, and from that judged that they had not been pulling (Tr., p. 650).

Mason didn't know:

"Q. Just before that time (when Miller's block 'dropped'), I'm asking you how these boats were pulling?

"A. They was pulling—

"Q. Slow speed, full speed, half speed?

"A. I don't know anything about that. * * * I don't know. They might be slow speed, might be full speed. It's up to them of course. I have no occasion to go around them steamers" (Tr., p. 902).

Clarke didn't know:

Referring to the time he felt the 'jump,' was asked: (Tr., p. 1120)

"You weren't noticing particularly what the steamers were doing? the ships?

"A. No. I didn't take no notice * * * at all.

"Q. Didn't know what they were doing?

"A. No."

And on page 1171, Transcript: He didn't know, or notice, or observe, whether any of the steamers were pulling, and was not willing to say what they did or didn't do, and for all he knew they may have been pulling their best speed.

Clarke was a very uncertain sort of witness in any event, judging from his befogged insistence that he saw or heard the Mauna Kea line break,—first on Wednesday when he said the Arcona came out (when the Mauna Kea wasn't there) (see Tr., p. 1074), then Tuesday (when he himself wasn't there at all), and when he said that on Monday he was rigging the Miller

tackle (which wasn't rigged until Wednesday). (See Tr., pp. 1072-9, 1135, 1137-8).

Moses Ekau didn't know:

He saw only the Mikahala. To the others he didn't pay attention (Tr., p. 1260). He didn't even know what the Mikahala was doing (although she "was right in front of my face when I was looking (Tr., p. 1260), and didn't look on the other side to see the others" (Tr., p. 1269).

Capt. Miller: On his own testimony of the duration of that sandwich supper, he could not have known much about what the vessels were doing toward the last, and he said that he was down in the cabin and didn't know what they were doing just prior to the signals (Tr., p. 1391). Also, that in the interval of fifteen or twenty minutes or half an hour immediately prior to the second bump (when the Ship came clear off according to his own testimony), he didn't know what the steamers were doing, and they may have been pulling hard all the time for all he knew (Tr., pp. 1652-3).

Capt. Schroeder didn't know:

"At first when I arrived with the Arcona I saw the steamers going full speed ahead. Then they decreased their speed until the Arcona herself moved her engines. At that time they went full speed. *During the latter part of the afternoon I do not remember what efforts the steamers made. During the night I do not know what they did*" (Tr., p. 388).

We point out that Capt. Schroeder's answer to direct interrogatory No. 12, where he said the three steamers

were moving their engines but scarcely tightening their hawsers, related to the time of his first examination, which was at about 9 o'clock on Tuesday morning (Tr., p. 390). The tide tables admitted in evidence in this case show that it was low tide at 8 o'clock that morning. This accords with the testimony elsewhere that at low tide the steamers did not go full speed, it being practically useless to attempt to do at low tide what they could not do at full tide up to that time.

It is a further fact, as a practical matter, where one vessel is towing on another which is stranded, there being considerable swell of the sea, that the weight of the towing vessel adds its comparative immobility or dead weight to the force exerted on the vessel, proportionately according to the size and weight of the towing vessel and the force of the swells. This operates in two useful ways for the benefit of the vessel ashore: First, the mere inertia of the towing vessel adds to the "weight" on the line, that is, the inertia of a large body cannot be as easily overcome and forced back, as in the case of a smaller one. It takes more swell and more force to make the towing vessel "give" in the direction of the stranded ship. It is in a sense a "floating anchor" which will not give readily, especially when it is supplemented and steadied by the towing vessel's own anchors out ahead.

In the second place, the working of the towing vessel in the swell amounts to a more or less continuous application of the weight of the towing vessel by its being alternately forced back by the swell, ever so

slightly perhaps, and then thrown forward again by means of the propeller until the weight thus moving forward is checked by the line. Thus the weight of the vessel (and contents), as well as the effective power of the propeller, is put directly on the line.

We are aware that Mr. Keech, unquestionably an expert in the matter of engines and their powers *as engines* operating in *still water*, doubts the idea that the pulling vessel has greater power when working in the open sea in a swell rather than in still water. All of his calculations of the actual or *useful* power of the engines of the Inter-Island steamers were made on the theory that the vessels are operating in smooth water (Tr., p. 3332), and without jerking. He even thought the steamer might in a rough sea have to use most of her power in maintaining her own position (Tr., p. 3332). But he admitted that there would be "quite a strain heaving on the line," but he would not regard it as a useful strain,—rather a "breaking strain" which could not be materially transmitted to the ship ashore,—"although I admit that it does sometimes help a little, not much" (Tr., p. 3332). In other words he would call it jerking rather than straining. As to jerking he was frank to say, "A jerk of that sort is often best to accomplish exactly what they are after, making a start" (Tr., pp. 3332-3), although his own faith in the effectiveness of such attempts is more like skepticism than faith. Further discussing the same question of what force can thus be brought into the line and upon the vessel, assuming it does not break, he said that he could

not say how much it would be nor did he think anyone else would be able to do so. We agree with him that without absolute knowledge of many indeterminable factors, the effective force could not well be calculated. But he says of the force, whatever it may be, "It's brought into the line" (Tr., p. 3334), but perhaps not all on the vessel. Some of it is doubtless lost in the elasticity of the line. Mr. Keech has his scientific theory of this matter, and he admits a power is there, that neither he nor anyone else can assume to measure. He deems it more or less inconsequential. But practical seafaring men of long years' experience do *not* deem it inconsequential. They know it is there, though none of them will assume to say what it amounts to. But they rely upon it and resort to it at every opportunity. Even Mr. Keech said, "It's tried because it is always tried" (Tr., p. 3333).

Certainly the Mauna Kea was able by a "jump" to break her big 12-inch line the second time, and, by the evidence, the breaking strain of a 12-inch manila is 56.4 tons (Tubbs, Tr., p. 1666). Even if, as counsel tried to make Captain Macaulay admit was possible, the first breaking of the Mauna Kea line might have been caused by the motion of the swell in forcing her back and then going forward again to recover her position (see Tr., p. 2418), we submit, would this not all the more indicate the great force which must be there, and which must have been more or less continuous in that steady pulling the Mauna Kea was doing then when the line *didn't* break?

Before proceeding to cite to the Court what the *seamen* think of this force, we wish to refer to the evidence of the actual useful thrust of the Inter-Island steamers in connection with opposite counsel's "five-ton block on a wharf" theory.

In a number of instances during the trial counsel put to witnesses the question of whether a given vessel could pull a five-ton block from a wharf, the conditions being that the test is made in *smooth* water (i.e.—see Tr., p. 1855). The object of these questions was, we think, to lay a foundation for subsequent challenge of the credibility of the witnesses who answered in the affirmative, by introducing the mathematical calculations of the actual useful power of the given vessel to pull in *smooth* water, as was put in by Keech. There is no question made of the correctness of the calculations made by Mr. Keech, as they tallied practically with those we have ourselves made by use of the formula and rule for deduction for losses stated to him on page 3330, Transcript, and which he said was the formula generally used. By those calculations and deductions, the evidence in this case is, that the indicated horse-powers and real pulling power in tons of the steamers are as follows:

Vessel.	Indic. H. P. Useful or Effective Thrust, in tons.	
	Tied up.	Running free.
Mauna Kea	2400 (3325)	12.165 (3326) same
Helene	470 (3317)	3.11 (3318) 3.26 (3317-18)
Mikahala	404 (3324)	2.977 (3324) 2.946 (3324)
Likelike	340 (3325)	2.56 (3325) 2.463 (3325)

(Note: Figures in parentheses indicate Transcript pages.)

Not having had the pitch of the Intrepid's propeller, we cannot figure her useful power.

Mr. Keech further admitted, on cross-examination, that the power running free and tied up are "somewheres near alike" (Tr., p. 3336); and either may be greater than the other, depending on the particular vessel.

It will be seen that counsel thought to show that Capt. Nelson ventured beyond his depth when he assumed to say that the Helene could pull the five-ton block off a wharf, in view of the calculation that her actual power in smooth water was only 3.26 tons at the most.

But the seamen, while not posing as "living encyclopedias" (Macaulay, Tr., p. 2357), and unwilling to say positively that such and such a thing could be done by a certain vessel, say, nevertheless, that whatever may be the power in *smooth* water, in the open sea and swell it is a *different matter*. Macaulay said, "I don't see any similarity in the case at all" (Tr., p. 2357).

He was certain, however, it "would be easy money" for the Mauna Kea to pull off a five-ton block (Tr., p. 2357), and in this he was safe because *her* calculated useful power was over 12 tons.

While we had not thought that counsel could go to the extent of suggesting that with a vessel ashore the pulling steamers would have to move the *whole weight* of the vessel, we think it well, in view of the question he put to Captain Macaulay about the Chiusa Maru weighing 900 tons and whether he thought the steamers there could pull off a 900-ton object, (see Tr., pp.

2358-9), to point out Capt. Macaulay's answer that the steamers didn't have to move any 900 tons but only the portion of her weight (whatever that may have been) not supported by the buoyancy of the water. As a matter of fact, in the case of a vessel aground, the pulling agencies must be able to move a weight equal to the difference between the weight of the object itself to be moved and the weight of the water it actually displaces. Hardly, theretofore, had we thought it might be argued in the present case that the pulling steamers had to move the entire weight of the Celtic Chief and cargo, as though she were high and dry.

Tullett said the Mikahala could pull off a three-ton object, because he had himself in actual experience pulled off with her a boat full of sand, from a beach (which is nothing like a smooth wharf), the boat and contents having weighed about four or five tons (Tr., p. 2718).

Capt. Haglund knew the "smooth water theory" as well as the work in a swell. When asked as to the amount of strain he thought was actually exerted by the Likelike, he said, "It all depends on the motion of the ship (Likelike) *along with* her horse-power used on the engine *and also* what power she exerted on the anchor chain" (Tr., p. 3167). How much that was he couldn't state, but in his judgment it must have been about 20 tons all combined (Tr., p. 3167). Given the "smooth water" question as to the tons of strain the Likelike could transfer to a fixed object, he said, "She couldn't exert very much power *towing in smooth*

water. I can't state exactly—but in the neighborhood of *three tons*" (Tr., p. 3167). He wasn't *far* wrong, as it was figured by Keech at 2.56 tons tied (see above), and Keech says further, "Of course it varies according to the quality of the machinery" (Tr., p. 3320).

So Capt. Haglund was asked further:

"What is the difference between towing in smooth water and water such as that that prevailed about the Celtic Chief?"

His answer was,

"*A great deal of difference.*"

"Q. Well, what is the difference?

"A. *The momentum of the ship, the whole weight of the ship in the seaway will add its weight to the towing hawser*" (Tr., p. 3168).

And again: He knew the Helene had more power than the Likelike because, among other reasons given, she was a heavier ship, and had in her besides about a hundred tons of saltpeter (Tr., p. 3170).

What, otherwise, did Connemann mean when he said, "This strain (of the Arcona) was further increased by the working of the Arcona in the swell?" (Tr., p. 421); and again: that the Arcona lines were taut "especially when the Celtic Chief and the Arcona were working in the swell" (Tr., p. 425).

As the Arcona was not using her propellers her weight was not thrown *forward* between incoming swells.

If in actual practice only the mechanical factors of the engine and not the weight of the pulling vessel would count in effectiveness of pulling, then a 500-h. p.

engine would be as effective whether on an ocean liner or a sampan.

Furthermore, all of Keech's testimony is applicable to propeller power only, and this should be carefully borne in mind. It also makes the "five-ton block on a wharf" theory *strictly* theoretical when we are in fact dealing with several added agencies of power, and, be it said, too, that while a towing vessel, towing free, may not be able to exert a steady or even strain *by towing alone*, yet, when that vessel is steadied by her own anchors she gets practically the full benefit of her propeller power to supplement anchor strain and heaving.

Counsel's discussions of effective power have heretofore been with respect to propeller power only, anchors not being considered. We need merely remind the Court of the testimony regarding the power exerted by the Inter-Island vessels by heaving on their anchors, elsewhere presented.

Another point respecting pulling and conditions of lines: When is a line taut? When is a "straight line" not a straight line?

We submit that when any witness, on any side of the case, talks of a line being taut, tight, straight out, like a fiddle string, etc., he is using a relative term. It is impossible as a physical matter for a line stretched between two points and otherwise unsupported to be really straight between the two points. A seaman will say a line is straight when it is straight as in practice or possibility it can be gotten. It is impossible for a line to be "exactly straight;" there must be "*some sag to it*" (Nelson, Tr., p. 2814). Capt. Henry of the Ship, ventured

farther than any other witness. He said "No, not impossible at all" (Tr., p. 200), "as long as there is no seaway" (Tr., p. 200). But he didn't mean straight "*all the time*" (Tr., p. 201).

See "Almost straight, once in a while a sag; touch down and come out" (Kennedy, pp. 788-9). "It couldn't be an absolutely straight line" (Kennedy, Tr., p. 790). Nelson thought the *Helene* could not get her line out (Tr., pp. 2811-12), but Henry thought otherwise "if she had strained" (Tr., p. 127). Nelson is alone in his opinion in that regard.

Lines can be kept out of the water "in a smooth sea," but not easy to do in a seaway (Henry, Tr., p. 200).

Piltz maintained that *Mauna Kea* could and *did* keep her line more in than out of the water,—perhaps because she had her anchor down. (See Tr., pp. 1925-28).

DANGER TO INTER-ISLAND STEAMERS.

It is not claimed that in these salvage operations there was any extreme or imminent danger to the steamers of the Inter-Island Company. They were not in "great danger" (Tr., p. 2985), but were in "some danger" (Tr., p. 2680), in that they were working under conditions which kept an ever-present possibility of danger of breaking of lines which might foul the propellers, to a degree not ordinarily attendant upon the operations of steamers (Tr., pp. 1824, 2286-7). They were towing in the first place, and a towing steamer always faces the danger, always of the uncertain kind, where

"it may be all right" (Tr., p. 3131), but where one "couldn't say" (Tr., p. 3131). The danger exists even with one steamer pulling on its own line, and here were many vessels and many lines, and there was actual breaking of lines at different times. Whether or not a line will, on breaking, be likely or unlikely to get into a propeller, depends on various conditions. If a line breaks some distance from the propeller the break leaves a more or less long part of loose hawser floating in the water, and if the break should throw or whip it forward toward the side of the pulling steamer its tendency would be to move with the suction of the propeller and it would almost certainly be drawn in and foul if not break the propeller. Stopping the propeller might ordinarily avert the danger, and ordinarily it can or *could* be stopped, just as every witness has admitted; but every witness has also said one "couldn't say" *how soon* the engine could be stopped. They even say it is probable that it *could* be stopped within a few seconds perhaps, if every condition on the bridge and the engine room were favorable to instant action. But there are always the unforeseen possibilities that could intervene. The danger of lines getting into propellers, not so much if the break is a fair distance away from the propeller, becomes more serious if the break is a close one. It might happen "almost instantly" (Tr., p. 2681). A short piece could snap back in "less than a second" (Tr., p. 2988), and the damage would be done before a move could be made to avert it. Capt. Haglund has seen lines broken and fouled with propellers "many times" with the "same kind of boats" (Tr., p.

2987). Tullett saw a brand new line do it (Tr., p. 2715). That was no place for a vessel to drift.

Incident to the danger above discussed is the consequent one of a possible collision among the different vessels, were the line of one of them to break (Tr., pp. 1824, 2286-7). This was more or less remote, no doubt, but was not only a possible danger, but one that nothing would justify its being run except in salving. The Likelike was probably safe from it more than any other, being farthest down in the lee of current and swell, but the Helene *could* have been a danger to her were the Helene to drift down. The Helene was probably in little, also, as the Arcona would have swung clear. The Mikahala was in more danger than any of the others, on account of the Arcona. Had the Arcona heaved on her anchor chain she would have brought not herself but her *lines* over to the Mikahala, as before indicated, in which case the Arcona herself would probably have swung ahead of the Mikahala as her stern was forward of the Mikahala's bow as it was. (See Tr., pp. 1831-5, 3060.) The other danger to the Mikahala from the Arcona was that of the Mikahala breaking her line and swinging to her anchor and being carried by the current and swell over to and against the Arcona (Tr., pp. 2680, 2710-13), and this might have been accomplished in perhaps three or four minutes (Tr., pp. 3126, 3207). With the Arcona's stern lines fast to her quarter bitts, as heretofore shown, there would not have been time for the Arcona to have steamed ahead and averted a collision, as counsel

thought would be the thing for her to do (Tr., pp. 3124-7).

Certainly the Arcona's officers were afraid of the breaking of lines which might have fouled her propellers,—a fear that was almost craven. Whatever the degree of danger may have been, the Arcona *refused to run it*. Had every Inter-Island steamer taken the same position the Ship would never have been pulled off.

SUMMARY.

The Inter-Island operations were undertaken and carried out with expedition, system and skill and under the direction of Capt. Haglund, the Inter-Island Superintendent, who made no false moves, but rather showed a valuable practical application of his own experience in salving with Inter-Island steamers.

It having been seen that the Mauna Kea could not pull the Ship off, nor start her with a jerk, laden as she was, and that more lightering was necessary and that this would take time, Captain Haglund had the Helene replace the Mauna Kea and lay both of her anchors well ahead to serve both as an anchor to prevent the Ship going farther in when lightening would otherwise permit it (Haglund, Tr., pp. 3066, 2894-5), and the Helene to use her propeller and winches on her anchor chains as best possible all the time. The Helene got out there about seven o'clock (Tr., pp. 2889, 2771), and was moored with her two anchors and her line taut before eight o'clock (Tr., p. 3023). The Mikahala, from the

first, was intended to handle the Ship when she came off, as, without one vessel being where she could raise anchor quickly and get out and away easily in charge of the ship, there would have been grave danger to all vessels involved. Therefore the Mikahala laid her anchor comparatively close to herself, merely to hold her own position against the sea and tide (Tr., pp. 2896, 2661, 1863), and was rigged with the bridle arrangement to enable her to change direction immediately and pull sharply aside if necessary,—a thing a vessel pulling on a stern line cannot do and keep pulling (Tr., pp. 1766, 2157-8). By the bridle arrangement either line or rein may be slacked or cut, and the other being fast *amidships* allows the steamer to turn as on a pivot and steam at right angles almost instantly. It was well planned and served the identical purpose stated. (See Tr., p. 3061.)

Later on, the Likelike was brought out to assist the Helene, and for the same purposes as the Helene.

Lightering was begun promptly and proceeded rapidly, care being taken for the boats and men but at not too great a sacrifice for speed in the work. Some risk was run, and run voluntarily (Tr., pp. 3076-8, 3088, 2725-7, 2608-12). It was accepted as part of what salvage involves. It is an element which courts recognize as lending merit to the service rendered.

In the hope that the Ship might come off on Tuesday night with the rising tide, the steamers were directed by red lanterns in the rigging of the Ship when to go at full

speed and put forth their best efforts. The effort failed that night, but the lightering continued with practically no cessation, night as well as day, in anticipation of the next tide, which was at 12:20 Wednesday noon, but the Arconia came shortly before and broke her line and maneuvered the rest of the day, and prevented the attempt to float her at that tide. It was confidently expected by practically everyone, however, that with the lightering done and to be done by midnight, together with the rising tide, the pulling on Wednesday night should be successful (Tr., pp. 2300, 2295-6), the Likelike having been added to the Inter-Island vessels with her propeller and anchors to increase the strain.

As was done the previous evening, on Wednesday night the second red lantern was placed in the rigging at the request of Capt. Macaulay, he understanding its import, at about half past ten or eleven o'clock Wednesday night (See Nelson, Tr., p. 2798; Haglund, Tr., p. 2925; Macaulay, Tr., p. 2294; Henry, Tr., pp. 220-24; Lowry, Tr., pp. 293-4; Brisco, Tr., p. 335; Piltz, Tr., p. 2737).

Capt. Miller and most of his witnesses have testified that the second red lantern was not put up until the Ship was already afloat. With his version of the "sandwich supper" as a test of credibility, we do not hesitate to rest on the testimony above cited to the contrary.

The steamers accordingly put forth their best efforts and so continued until the Ship began to show signs of getting more lively and shifting and rolling in her bed.

Capt. Haglund came on board the Ship at 11 o'clock, and, in his confidence that the Ship would come off that night, he took steps to make all clear. He stopped the lightering at the main hatch in order to let the donkey scow be cast off (Tr., p. 2156), and sent Capt. Piltz over to the Mikahala, thus ending the lightering (Tr., p. 1965), and stationed men with axes ready to cut the lines of the steamers (Tr., pp. 2918, 3038-41). Piltz, arriving on board the Mikahala, immediately hoisted the boats and stationed men there with axes to cut the Mikahala bridle line when he had to turn (Tr., p. 1780). The plan was that as soon as the Ship was afloat the line of the Likelike should be cut first, being farthest from the Mikahala, and then the Helene line and one of the lines of the Mikahala (leaving her bridle-rigged line until shortly afterwards), all of which was done exactly as planned (Tr., pp. 2916, 2320, 2774), and the second line of the Mikahala was cut after her side pull on the Ship had been accomplished (Tr., pp. 769-70, 1796; Henry, Tr., p. 192).

At about quarter of twelve, the Ship beginning to move seaward, the Mikahala executed the first step in her final duty by moving slightly more to eastward to get squarely in line between the Ship and her own anchor, to be in readiness to pick it up promptly (Tr., pp. 1983-4). Finding the Ship surely coming, Capt. Tullett hove on his anchor to take it up, and took in most of it until it got foul on the bottom and as he could not take it in he took a turn on his weather bitt and deliber-

ately broke it to be free quickly (Tr., p. 2672). By this time the Mikahala had gradually moved forward until her bow, at first just in line with the stern of the Arcona, forged ahead and past the Arcona. At this time, the Mikahala still edging eastward, the Ship began to come off very rapidly, acting obediently to the combined pulling of the Helene and Likelike on the one side and Mikahala (more across) on the other (see Tr., pp. 3154, 804-5, 802), and came clear of the reef and in a direct line for the Arcona which vessel lay still in her position throughout; and when it became apparent to Capt. Tullett that the Arcona wasn't moving or going to move and there seemed some danger of a collision from the Ship, he headed the Mikahala abruptly East, cutting the starboard rein of the bridle for the purpose, and steamed Eastward off at right angles to her former course, pulling from her port waist (Tr., pp. 1983-4), which means the Ship was swerved, and brought her to a standstill, when her line was cast off from the Ship. (See Dowsett, Tr., pp. 2099-2100, 2151-2, 2162; Macaulay, Tr., p. 2322; Tullett, Tr., pp. 2672, 2847; Haglund, Tr., p. 2919; Lewis, Tr., pp. 3231, 3252-3). The Arcona thereupon, having hastily picked up her anchor, put on full speed and fairly darted off with the Ship in tow. Then, instead of fulfilling the express understanding that the Arcona was "to take charge of the vessel and bring her to a safe anchorage (Macaulay, Tr., p. 2318), the Arcona let her go "in the open sea" (Macaulay, Tr., pp. 2323-4); and when Capt. Henry

had to fall back on Haglund again for aid to get the Ship to a safe place, Haglund very naturally was unprepared, and said his "boats were here, there and everywhere." But he agreed to take charge again when the Arcona was out of it (Tr., p. 2924), and the Likelike then took hold, and towed her back to a safe anchorage off the harbor (Tr., p. 2325). It is some small part of the service of the Inter-Island Company that the Ship was thus cared for after the Arcona let go. The Arcona let go out in the open sea, and not anywhere near where an anchor could be laid. It amounted practically to the Likelike towing a helpless vessel into port, as though disabled in some way. Under all the circumstances and in the dead of night, it was not "usual towage" as claimed by Capt. Henry (Tr., p. 142). As a matter of fact the Arcona took the Ship so far out that it took the Likelike from 2 to 3 o'clock to get back to the usual anchorage off the harbor (Henry, Tr., p. 147).

The Ship having been safely anchored, the Likelike and Helene stood by until morning, by way of greater precaution, should anything occur to make help necessary (Tr., pp. 2958, 3051-2). It may be argued that this last office was unnecessarily assumed and that the Ship was perfectly safe without it. That is probably true. But it was thought wise, and nothing is claimed in this case on account of it except the fair judgment of the Court as to whether or not the Ship's Captain felt any easier for it having been done, and except as it will characterize the thoroughness with which the Inter-Island work was put through.

In the morning the Inter-Island steamer "Maui" towed the Ship into harbor and to dock (Henry, Tr., p. 147). This was not salvage but towage, but as towage it has not been compensated for, and we ask that it be considered and allowed for accordingly.

On this appeal all parties have accepted the finding of the trial court that the value of the Ship was \$25,000, and that of the cargo (including freight money) \$109,559, making a total of \$134,559. (Tr., p. 3372.)

There is no reason to question the findings of the Court as to the values of the Inter-Island vessels (Tr., p. 3372), because they stand undisputed. Their ownership was admitted (Tr., p. 744). The length of time these vessels were engaged is also stated by the Court (Tr., p. 3372). The value of the Intrepid was admitted to be \$30,000. (Tr., p. 3221.) The complements of men on the Inter-Island vessels were also admitted,—154 men in all,—(Tr., pp. 3220-1). Besides these vessels the Inter-Island steamer Iwalani made a trip to the vessel on Monday morning (Tr., p. 746).

Nor is there any question that the extra expenses of the Inter-Island operations, exclusive of regular salaries and wages, were \$3,561.77, as found by the Court (Tr., p. 3372).

Another element which enters into the actual losses by the Inter-Island Company on account of the salvage operations is that which must admittedly result from the inability of the Mikahala to make her usual Molokai-Maui run (Tr., pp. 2958-9), in consequence of which

a "much smaller boat," the Ke Au Hou, was substituted. It needs no argument to have the Court recognize the fact that a much smaller boat could not handle the regular amount of freight nor carry the average number of passengers, and some loss necessarily resulted on that account.

THE ARCONA.

The principal contention of the Appellant in the court below has been that the Arcona was the principal if not the sole agency which effected the floating of the Ship. A large part of the testimony on the trial therefore bore on this issue, and the depositions of the officers of the Arcona, when opened, showed a clear admission that the Arcona was not using her propeller. The comment of the trial Judge that much of this testimony was profitless (Tr., p. 3358), is very true, but, in view of the pleadings, it could not well have been anticipated that the claimant's own proofs would show no use of the latent power of the cruiser. Nevertheless, the Court's remark seems to us particularly indicative of the real ineffectiveness of the cruiser as a salvor. But we have no assurance that appellant will not still maintain that great credit is due the Arcona. Not only this, but Counsel's arguments heretofore have been replete with references to the large tonnage and horse-power of the Arcona, and the large experience of her principal officers. Moreover, it has been claimed that the bare fact of the presence of this cruiser in the harbor of Honolulu

made the case very different from one of a vessel ashore far from any port of assistance, because the Arcona was available at all times and could have been had if necessary. Therefore, that the Ship's location was not really precarious and the salvage services were of little real merit. The Loch Garve case has been cited as one where the danger was greater because of the greater distance from a port of assistance.

We think that the mere difference in geographical location,—about sixty miles only, would matter little so far as vessels or aid other than that of the local agencies is concerned. It is true that Honolulu is more convenient, as respects aid from Honolulu or Honolulu harbor, but the principal difference that opposite counsel would urge upon the Court seems based on the fact of the mere physical presence of the German cruiser "Arcona" in the harbor of Honolulu at the time. We submit that the record shows a case equivalent to the utter absence of the Arcona, so far as that vessel was concerned as a "salving agency." Nearness to a port of safety means nearness to a port from which assistance can actually be had. Absence of all vessels from Honolulu and vicinity would make Diamond Head reef or Barber's Point almost as remote from salvage aid as a vessel on the French Frigate Shoals. Capt. Henry of the Celtic Chief, and opposite counsel in this case, are pleased to allude to the Arcona in terms descriptive of a "big powerful vessel" which could have been called upon and was there to help if the other agen-

cies failed. Because the Arcona has claimed and will claim no salvage it behooves counsel to belittle as far as possible the efforts of the other or real salving agencies.

In point of fact, the Arcona *was* called upon for assistance, on the evening of the first day the Ship was ashore, request having been preferred by the British Consul, and this request was next morning supplemented by that of the agent for the cargo, and yet this cruiser did not go out until noon of the *third* day.

It is submitted that no rule of law, or *theory* of law, ought to be applied in this case which would detract from the merit of the services actually rendered a vessel ashore by the only *real* salvors who did go out and give immediate assistance at the time when her position was most critical and her danger uncertain and possibly imminent, and who actually saved her from destruction, especially when, by the evidence of the most credible witnesses in the case, the *theoretical* power of the Arcona and supposed ability of her officers was shown, by their actual operations, to have been anything but potent, efficient or valuable. With all the factors pertaining to a vessel of her size and kind, that is to say her tonnage, horse-power and general equipment the cruiser *should* have been a valuable aid. Instead of that her operations were cumbrous and wholly unseamanlike; her advice to the Captain was more bad than good, and even after she towed the ship out into deep water she practically deserted her and left her in another position of danger.

Instead of being a help to the distressed vessel, the Arcona probably prevented the floating at an earlier time, because the cruiser appeared on the scene just before the high noon tide on Wednesday at which time there was at least a hope that the vessel would come off, and the steamers were pulling hard when she came, but had to suspend operations to make way for the Arcona to take position and run lines, and as she was all afternoon in doing it the pull was lost for that tide. The vessel might otherwise have been floated that afternoon. See Tr., pp. 2505-6, 2665-6, 2720 and 388.

We make the foregoing statements with reference to the Arcona because we submit they are abundantly established by the following evidence in the case.

In the first place, while it must be assumed that it was the intention of the Arcona's Commander to assist, when he finally did go out to the scene of the operations, we think it was to be only in his own way and in his own good time. We find, in the evidence, here a glimmer and there a glare, of something else that was manifestly of greater importance in their minds,—the safety of their own vessel. They were afraid that the cruiser would be injured in some way and they were caring for the cruiser *first*.

Beginning with the evidence of Mr. Watkins, we find (and elsewhere as well), that the Commander didn't *offer* his services; they were requested by the British consul (Tr., p. 3290), on Monday evening, December 6 (Conneman, Tr., p. 423).

Now an official request like that must be acceded to. But he did not hurry about it. He went out in a launch on Tuesday morning, Mr. Watkins accompanying him, and they talked. He "seemed very loath to say anything about it until he had seen the conditions," and on the way back, having *seen* the conditions, Mr. Watkins asked if he wasn't "perfectly willing to *go out right away*, and he said, *No*, he'd made up his mind that *he would not go right away but he'd wait until the next day* and then if the agencies at work had not pulled the ship off he would go out the next morning." (Tr., p. 3291.)

"Q. Did he say anything further about that?

"A. Well, he, as I say, he seemed to be, *he didn't relish the job; that's the impression he gave. He didn't relish the job of going out.*" (Tr., p. 3291.)

On Wednesday morning, still leaving the cruiser behind, he went out again, Mr. Watkins with him, and "he stated at that time that *he wanted the position that the Intrepid had* and told the Captain in my presence, Capt. Henry, that he wanted that position, *and unless that position was made clear for him that he would not take hold*" (Tr., p. 3292). Perhaps that condition, being an unusual and arbitrary one, he hoped it might serve to let him off.

Mr. Kennedy testified to the Commander having said he would pull after 1,000 tons of cargo had been removed (Tr., p. 822).

The Intrepid held the *best position* (Tr., p. 2504), and the cruiser must have the best. His aid would be available *only upon condition* that the Captain of the Ship "would get the Intrepid out of that" (Henry, Tr., pp. 122-3, 168-9). And, no doubt, Capt. Henry expected to get a big power on his ship if she went out there, so he met the condition.

The Commander would have liked more than that; he wanted Miller to make room for him too (Tr., pp. 1356, 1691-5, 1899, 1919).

Appellant's counsel have even argued, in effect, that the *Mikahala* should have vacated *her* particular part of the ocean had there been any question of the Arconia moving that way, by intent or otherwise.

The Arconia first went out at about eleven o'clock on Wednesday (Tr., pp. 1786, 2663, 2896, 3057). Proceeding, then, to "take her position," she steamed to a point *directly astern* of the stranded Ship, and there dropped her anchor (Nelson, Tr., pp. 2777-8; Tullett, Tr., pp. 2663-4; Libellant's Exhibit "H" showing Arconia anchor by a cross marked "1"; Macaulay, Tr., p. 2479, referring to Exhibit "H"; Haglund, Tr., pp. 2895-6); approximately between the locations then held by the *Mikahala* and *Helene* (Piltz, Tr., p. 1786), and about 1500 feet from the Ship (Haglund, Tr., p. 2896); making no allowance for tide, wind, or current, in consequence of which, as will be seen, she had to change her position.

But having thus first dropped her anchor she ran a manila or hemp line to the Ship, and whether it was

intended only as a messenger to send over a small wire or whether it was really used at first instead of a wire to heave the Arcona around into position, it broke (Nelson, Tr., p. 2777; Tullett, Tr., p. 2665; Brisco, Tr., p. 323; Haglund, Tr., pp. 2896-7). In any case she passed a small wire to the ship and made that fast and hove on it to bring the cruiser around into position, not intending to pull on the ship (Haglund, Tr., pp. 2896-7, 3058; Henry, Tr., p. 128; Piltz, Tr., p. 1847). Schroeder and Conneman called this a "test" (Conneman, Tr., p. 421; Schroeder, Tr., p. 387, 394). At that time the cruiser was lying practically at right angles, broadside to the stern of the Ship (Haglund, Tr., p. 2896); heading about East (Tullett, Tr., p. 2665); "laying cross-wise" (Mason, Tr., p. 945).

Whether in heaving on this wire (which was her own, Tr., p. 2334), to get into position in line fore and aft with the Celtic Chief, she used only her capstan at first, and then her propellers (Tr., p. 2896), it is clear that no sooner had she started her engines than the wire broke (Haglund, Tr., p. 2897). Some witnesses say she pulled just about a minute (Weisbarth, Tr., p. 636; Piltz, Tr., p. 2047). "Steamed ahead" (say 6 or 7 revolutions, Tullett, Tr., p. 2664); and "steamed on it" (Weisbarth, Tr., p. 604). "Pulled on it and the line parted" (Ib. 607). "Directly after she started ahead" (Macaulay, Tr., p. 2309).

The time of breaking of this wire was between twelve and one o'clock (Tr., pp. 1806, 2664, 2720, 2933, 3057), and about high tide (Tr., pp. 2664, 2720, 2933, 2331).

Meanwhile the Arcona had been swinging from her anchor, by force of the tide, wind, sea, and current, until she had moved down too close to the Helene (Tullett, Tr., p. 2663; Piltz, Tr., pp. 1786, 1826-30; Macaulay, Tr., p. 2302), endangering that vessel as well as herself, and consequently imperiling the Ship (if the Helene had been interfered with); too close to heave clear of the Helene and get into position (Haglund, Tr., p. 2898). She therefore hove up her anchor (Tr., pp. 2663-4, 2778, 2304), and steamed eastward and seaward, toward Diamond Head, this time further eastward than necessary or consistent with safety because she went ahead of the Mikahala (Nelson, Tr., p. 2778; Piltz, Tr., pp. 1786, 1829; Macaulay, Tr., p. 2305), and dropped her port anchor there, about a point to port of the Mikahala's bow (Piltz, Tr., pp. 1787, 1790). When she dropped it her stern was directly ahead of the Mikahala's bow (Piltz, Tr., pp. 1788, 1929). One witness merely said she "went to anchor" (Mason, Tr., p. 934).

If a straight line were drawn from the stern of the Celtic Chief out to and continuing seaward through the Mikahala, the point where the Arcona's anchor was thus dropped the second time would be practically on that line but a little to the east of it if anything (Haglund, Tr., pp. 2898-9; Macaulay, Tr., pp. 2305, 2306-7, 2477-81),—the east or Diamond Head side of it (Piltz, tr., pp. 1787-90).

From where Capt. Haglund stood at about the middle of the Ship astern, this line extended out, not

through, but past, and just clearing the Mikahala's starboard bow (Tr., p. 2899). He saw the anchor dropped in that position (Tr., p. 2899), the Mikahala not being *in* the line or obscuring his vision. Counsel endeavored to confuse Capt. Macaulay by trying to make him explain how he could see the anchor dropped unless he looked through the superstructure on the Mikahala. It developed that when Capt. Macaulay said he saw the anchor dropped he did not necessarily mean he saw it as it entered the water, but he is positive he saw the splash made by the dropping of the anchor (Tr., pp. 2306, 2578), and saw it over the bow of the Mikahala (Tr., pp. 2478-87, 2582-92).

Captain Macaulay also drew a sketch of the positions of the vessels, as they lay on Wednesday night (Tr., p. 2228), admitted in evidence as Libellant's Exhibit G (Tr., p. 2301), on which Position "A" indicates the position where the Arcona's anchor was first dropped (Tr., pp. 2302, 2479-80), and on which sketch the witness also drew the second position of this anchor, marked as Position "B" (Tr., pp. 2305, 2480).

The evidence is not exact as to the distance ahead of the Mikahala to the point where the Arcona anchor was dropped the second time. Captain Haglund was sure of the line in which it lay from the Ship, but not of the distance ahead of the Mikahala because he could not very well judge from his position which was at one end of the line itself (Tr., pp. 2898-9). Capt. Macaulay, for the same reason, didn't care to state the distance, but on an answer being pressed said he thought

it would be less than five hundred feet, and must have been three or four hundred feet (Tr., p. 2308), and again he later said 500 or 600, might have been 400 (Tr., pp. 2482-3). And see (Tr., pp. 2577-9, and 2582-92). Capt. Piltz said first about 300 or 400 feet (Tr., p. 1787), and then 200 to 300 feet (Tr., p. 1788, and see Tr., p. 1969).

See also Capt. Tullett's sketch admitted in evidence as Libellant's Exhibit H (Tr., p. 1953), where the second position of the Arcona's anchor is shown as figure 2 (Tr., pp. 1952, 1955).

Capt. Henry didn't know where the Arcona anchor was (Tr., p. 179). And there is not any evidence contrary to that of the witnesses indicated above. She did not take up her anchor again that evening (Macaulay, Tr., p. 2305).

As to placing of anchors, the officers of the Arcona leave the point indefinite. Conneman makes no reference to anchoring more than once. He said, "The Arcona *anchored* near the Celtic Chief and took a position for towing" (Tr., pp. 419-20); then "an anchor was laid" (Tr., p. 420); and the anchor chain "ran to the *right* forward" (Tr., p. 428). Capt. Schroeder says, as to laying the anchor, "for this purpose I once changed my berth" (Tr., p. 382). And he said he did not remember "whether this anchor was laid out at 12 o'clock or when I had to change my position" (Tr., p. 386).

May we here note the conclusion of the trial judge (Tr., p. 3360), that he did not think the Arcona anchor

was as far over as Piltz, and the other witnesses said, even though they were regarded by the court as "four credible witnesses." Not only is there *no evidence to the contrary*, but Schroeder himself said that his anchor was out on about 100 meters of chain (328 feet), the direction being "two points (23°) to the left of the bow of the Arcona" (Tr., p. 392). And although the *stem* of the Arcona was about opposite the stem of the Ship her *bow* was inclined toward the East (Tr., pp. 1981, 1987), her stem being about abreast of the bow of the Mikahala (Tr., pp. 1967, 1788, 1834), and was only about 150 or 200 feet from the Mikahala (Tr., pp. 762, 1788, 1984). And see Libellee's Exhibit 6 and Tr., pp. 2136-7, 2138-40, 2089-90, and also Macaulay's sketch, Libellant's Exhibits G and H, and Tr., pp. 2313, 2659-61. The Mikahala herself was only three points off the Ship's stern (Tr., p. 2222), and 500 feet from the Ship (Tr., pp. 2222, 2902, 2709). Any approximate scale sketch will show that the Arcona anchor *was* away over ahead of the Mikahala.

Having dropped her anchor the second time, the Arcona paid out chain (Tr., p. 2899), and swung to westward towards the Helene (Piltz, Tr., p. 1789; Tullett, Tr., pp. 2664-5), until she got about half way between the Helene and Mikahala looking from the Celtic Chief (Haglund, Tr., p. 2899), but seaward of them a little. She then ran a second wire, and another, and maneuvered with them until she was ready to "test," whereupon she started up her engine, steamed

ahead, and broke one wire,—the wire borrowed from the Ship. This second breaking occurred somewhere around three o'clock.

By the evidence these lines were entirely too small for towing purposes (Haglund, Tr., p. 3058), and which we think her commander well knew because he was careful to apply his engine power very cautiously to test them with the result that they broke after a few revolutions. Realizing their weakness he did not again attempt to tow with them. Her executive officer said as much to Capt. Haglund (Tr., pp. 2912-13). Macaulay said he "hove an ordinary strain" on it and "let it go at that for the time being" (Tr., p. 2309). After about 20 minutes or half an hour she tightened up on the wires and by two o'clock she was *ready* to pull (Henry, Tr., pp. 186-7), and after about 20 minutes or half an hour after that she tightened up on the wires (Henry, Tr., p. 188). The first "pull" then began, between two and three o'clock (really about 2:30,—see Nelson, Tr., pp. 2778, 2820; Brisco, Tr., p. 324; Henry, Tr., p. 187). Henry says when she put a *strain* on that line it carried away (Henry, Tr., pp. 128-9), meaning the Ship's own line (Henry, Tr., p. 188). The cruiser thus broke the Ship's wire by steaming ahead with her propeller, and the breaking was practically immediate. "Just a few turns with her engine" (Piltz, Tr., p. 1805); "went ahead * * * with their engine and parted those wires or one of them" (Nelson, Tr., p. 2778), and she had been using her propellers "not more than five minutes * * * might have been less, might

have been a minute" (Nelson, Tr., p. 2818). "She pulled on it and the line parted" (Weisbarth, Tr., p. 607). Lowry says "she went ahead and broke it" (Lowry, Tr., p. 272). He thought it broke at about half past three (Tr., p. 272).

Capt. Henry was very evasive when asked how long the cruiser had been pulling before she broke that wire. He gave the time as two o'clock when she was ready for the first attempt (Tr., p. 187), and it was about twenty minutes or half an hour after that that he saw them tighten up (Tr., p. 188), and that the breaking occurred "between 2 and 3 o'clock" (Tr., p. 187), but he would only say, in answer to the question "how long had she been pulling" prior to the break? "I cannot say;" "no, not a great length of time;" and "I don't know whether she had been pulling any length of time or not" (Henry, Tr., p. 188).

It appears that although the Arconia started her propeller that afternoon, it was only a "test," as, in answering direct interrogatory No. 26, Capt. Schroeder said, "There was one test made during the first attempt in pulling the Celtic Chief off. The test was made by heaving in the anchor chain until the line was taut and then moving the ship's engines with increasing speed. The result was the line snapped at revolutions for eight knots speed" (Tr., p. 387). They didn't try it again. This falls easily into harmony with the idea that the line was too small in the first place for pulling with the propeller, and they knew it, but ventured a test. This

view is supported further by the opinions of competent witnesses:

Mr. Kennedy felt satisfied that the Commander of the Arconia would not be foolish enough to put on full speed ahead in testing a wire. "No careful person" would. He assumed, therefore (as was the fact), that the test was made with slow speed at first. From the further fact, known to him (see his phrase "They turned her engine and busted it," page 776), that this was hardly begun before the line broke, he deduced the conclusion that the line so broken was not a strong one (Tr., pp. 777-780). Mr. Kennedy showed a fair opinion of the judgment he at first thought the Commander had,—because he assumed he would be a "careful person." Captain Haglund said "That was no size wire for her to pull on" (Tr., p. 3058).

Whether or not heaving *only* was intended in the first place, and not propeller pulling, there was *no question about it after* that "test."

The next move of the Arconia was an attempt to get a large wire on board. Capt. Macaulay said "the executive officer told us that they had a very powerful wire, very heavy and powerful wire, and they would try to get that on board. * * * That was Wednesday afternoon * * * after she broke her first wire. * * * They bent this messenger (previously mentioned by Capt. Macaulay, Tr., p. 2312), on to this heavy wire and they hove it as taut as ever they could. They couldn't get it no more and the messenger parted, so

they hove it a seond time and bent on to this heavy wire and I believe it parted a second time. I don't know exactly how many times it did part * * * I was on the poop of the Celtic Chief, but, however, they gave it up and said they couldn't get it on. Q. Do you know why they couldn't get it on? What prevented? A. The messenger line parted two or three times. Too heavy. That heavy wire, I suppose, digging into the sand and so heavy that the messenger wasn't strong enough. However, they gave it up" (Macaulay, Tr., p. 2313).

This is borne out fully by the following additional testimony:

Capt. Piltz said of it that they spent several hours trying to get this big hawser aboard, and they failed,—gave it up,—and took it aboard the Arcona again (Tr., pp. 1805-6); adding also that in his judgment the weight of the wire and the way they went about it, letting its end catch on the bottom, made them give it up (Tr., p. 1806).

Mr. Dowsett said "they had no success at all," although they made two or three attempts while he was there (Tr., p. 2088).

Capt. Tullett says she spent quite a long time on it, about three hours. "She made three attempts and each time it got foul of the bottom and they would break the line that they were heaving on board the ship and they finally gave it up and went out on the Arcona again" (Tr., p. 2665).

When they left off this attempt it was between three and four o'clock in the afternoon (Tullett, Tr., p. 2665).

Captain Haglund said of this big hawser work that it fouled on the bottom, and what he saw was that "she tried to heave it aboard with a surf line *without anything to keep the wire from sinking; no buoy, no boat, or anything*, consequently she sunk to the bottom and dragged herself down" (Tr., pp. 2899-2900). They took two or three hours at it anyway (Tr., p. 2900). Capt. Haglund then proceeded further to tell how they should have gone at it. Under the circumstances, the Arcona having a steam launch which was used to carry over the surf or messenger lines, they should in his judgment have run the surf line and then put the end of the wire on the launch and put it on the Celtic Chief, and it could have been done within five minutes (Tr., p. 2900). It is clear that *anything* which would have floated the end and kept that from sinking down and catching on the bottom would have met the difficulty.

Note the *admission* indicated by Conneman's answer to direct interrogatory No. 24 (Tr., p. 420), when asked how the Arcona was connected with the Celtic Chief: "During the afternoon * * * by one steel cable, and in the *evening* by two steel cables." He forgot the "big hawser."

After they gave up the attempt to run over the big hawser, the Arcona officers then ran another small one, and then another, one of these being the Ship's broken

wire which was spliced in the middle (Henry, Tr., p. 189; Haglund, Tr., p. 2901). It was even then too short and was pieced again with a piece of wire from the Arcona (Henry, Tr., pp. 189, 195, 197; Macaulay, Tr., p. 2509), which piece was 75 meters long (Henry, Tr., p. 383), and which piece Haglund says he saw at the place it was fast to the quarter bitts on the Arcona when he went aboard her Wednesday evening, and that it was *smaller* than the *Ship's* wire (Tr., pp. 3030, 2226).

May we here refer to the record as to the sample of wire which Captain Henry produced during his testimony, then marked Claimant's Exhibit, Henry B (Tr., p. 3026), and later, on the trial, received and marked as Libellee's Exhibit 7 for identification (Tr., p. 3027), which was exhibited to Capt. Haglund, and of which Haglund said that neither of the lines the Arcona had to the Ship was as large as that (Tr., p. 3028), but of which he said further that it may have been a part of the wire of the *Celtic Chief* (Tr., pp. 3029, 3192). The witness sought to show that while the sample produced may have been part of the Ship's wire, nevertheless it was not a sample of *the wire*—i. e.—the size, and therefore strength, of either of the wire *lines* used in pulling by the Arcona, *because* the *Celtic Chief's* wire had broken, was spliced, and was too short, and was *pieced* at the *Arcona end* by a *smaller* wire furnished by the Arcona, and no part of the *Celtic Chief's* wire came on board the Arcona (Tr., p. 3032). Note his reference to the “*whole* wire” (Tr., p. 3032). Also

counsel's admission that it was not a sample of the "whole line" (Tr., p. 3196).

But counsel fought strongly against questions put on redirect examination to bring out these facts, and offered many forms of "admissions" to prevent further questions (Tr., pp. 3192-99), and finally was forced to admit the fact itself that the lines not supplied by the Celtic Chief—i. e.—those furnished by the Arcona,—were "*an inch* in diameter only" (Tr., p. 3199). Haglund had already testified that the Arcona lines were "one-inch diameter, three inch circumference" (Tr., pp. 2901, 3198). The "sample,"—of the Ship's wire, was *larger*, being an inch and a quarter diameter or four inches circumference (Tr., p. 3027), as against the one inch (or three inch circumference) of the parts on the Arcona end. And be it remembered that the Celtic Chief's larger wire had already broken, and the smaller piece later put on was, still further, the weakest part.

The testimony shows, we think, that the two lines were not "made fast" until some time between six and seven o'clock that evening. As the point is important as indicating the degree of seamanship on the part of the cruiser, we cite the following testimony giving times varying from five to half past seven.

Captain Henry said the two lines were "made fast" by five p. m. (Tr., p. 130), and were "getting an equal strain on them by six (Tr., pp. 131, 186), and at eight o'clock were quite tight" (Tr., p. 190). In another

place he said that the time between 6 and 8 o'clock was used "to get an equal strain on them" (Tr., p. 190).

Piltz was sure the lines were not fast by five o'clock because at that hour he left the Ship for the Mikahala (Tr., p. 2048), and they were just about fast when he returned at about 7:30 (Tr., p. 2049). He says they were fast at about 7 or 7:30 (Tr., p. 2048).

Tullett said between six and seven (Tr., p. 2666).

Nelson said about seven o'clock (Tr., p. 2779).

Haglund said between six and seven—nearer seven (Tr., p. 2901).

In this process of getting an equal strain, which Capt. Henry says was then done, the Arcona's wires "were in the water now and again, and then they would be tight, and then they would slacken up again" (Henry, Tr., p. 244).

Captain Tullett said the wires were fast "between six and seven" (Tr., p. 2666).

Capt. Nelson said "about seven o'clock" (Tr., p. 2779).

Capt. Haglund said "between six and seven * * * nearer seven" (Tr., p. 2901).

They then proceeded to "equalize" or "get an equal strain" on the two lines (Macaulay, Tr., p. 2509). Capt. Henry said this covered the time between six and eight o'clock,—"by eight o'clock" (Tr., p. 190),—but we submit that the equalizing process of the lines, between six and eight, bringing them alternately in and out of the water, and making them tight and slack

(Tr., p. 244), was not finished by eight, because Mr. Kennedy said that he did not leave his *house* that night until about half past eight (Tr., p. 760), and reached the Mikahala at 9 or 9:15, and that *then* he noticed "the cable of the Arcona" (and only one was visible to him at all that evening, (Tr., pp. 784-5), was "playing up and down in the water" (Tr., p. 761).

The Arcona's possible power was in any case practically limited to the strength of but one of the two wires which ran to the Ship for the reason that the wires were run more or less parallel separated by the width of the Ship at one end and of the cruiser at the other end and the ends made *fast* both on the Ship and the cruiser (See Tr., p. 3031).

It follows that the least variation in direction of the Arcona would slacken the "off" line and bring all the strain on the "near" line or vice versa. Also in view of the way the lines were thus made fast on both ends we do not see how the cruiser conducted her "equalizing of the strain" except slightly by changing her own point of direction—possibly by working on her anchor chain. Certainly, with her anchor where it was, *had she heaved* and consequently swung more toward her anchor, the inner line (starboard on the Ship), would have slackened and any strain would have been only on the other line. But this, they say, didn't happen; they "kept them equalized;" and the Arcona *didn't* move over.

Capt. Schroeder (Tr., p. 394), and Lieut. Conne-
man (Tr., p. 429), each in answer to I. I. cross 29,

say in effect that the position of the Arcona, when her lines were finally adjusted was about in line with the line of the Ship. This evidence is, in our judgment, rather overwhelmed by that of the other witnesses, heretofore referred to, that the Arcona lay with her stern about opposite the Ship's center line astern, but her bow was inclined at an angle somewhat to the eastward,—toward Diamond Head. See also the sketches on file.

After the two lines were fast, and apart from the "adjusting," it is the testimony of many witnesses that the Arcona did *nothing at all* involving her lines or any motion or use of her lines and did not move herself or her propeller or use her winches to heave; that she simply lay there inert and inactive in all respects except for using a searchlight later in the evening; and that this condition of affairs on her part continued absolutely without interruption until after the Celtic Chief was fully afloat and about to collide with her, when she first moved,—first to get out of the way and then to tow the unfortunate vessel far out to sea and cast her off.

As this inaction of the Arcona forms a very important part of the case before the Court, we trust we will be pardoned for making very full references and quotations from all of the evidence, both pro and con.

It has been argued that the strain by the Arcona was so great that it "crushed the strongbacks." (Citing Lowry, Tr., p. 274.) It is sufficient to reply that there is no showing that it was not the afternoon strain that crushed them, which strain was never renewed. See,

also, the comment of the trial court on this point (Tr., pp. 3359-60).

The testimony indicating pulling by the Arcona is naturally found in that given by the officers of the Celtic Chief and of the Arcona, who are, on their side, interested in giving the Arcona all possible credit in the operations in order that the amount of salvage to be paid will be as small as possible,—we say small because however much or little part the Arcona may have had in the actual salving, any portion of the award credited to her will be cancelled because that vessel will receive no salvage.

Capt. Henry:

From eight o'clock on, he said he "could see the lines *standing right out of the water*." Like a "*line straight across*." * * * There may have been an occasional dip, I would not say as to that, but any time I noticed there was always a steady strain on them and the lines *straight out of the water*." (Tr., pp. 190-191.)

Just prior to going down to the sandwich supper, "They were *right straight out of the water*." (Tr., p. 212.)

When the fireworks went off "They were *tight, right out of the water* at that time * * * Yes, *straight out of the water*." (Tr., p. 140.)

Lowry:

"They were *straight out; tight all the time*" (Tr., p. 274).

(Note: *But*, Lowry went to bed at 10 and came out at 11:30 and went forward immediately and didn't know anything about them. So his testimony can relate only to the time *before* 10 o'clock.)

Brisco:

Said they got a steady strain by six o'clock, and then they looked tight,—“*Yes, straight out*” * * * “They were stretched out, *straight out*” (Tr., p. 326).

“The last I saw of them they were like that; it started to get dark and there was still a good strain on them.” (Tr., p. 326.)

“From twelve o'clock until she came off he said he observed them and “They had a good strain on them,” constantly. (Tr., p. 327.)

A general reading of the testimony of Capt Schroeder and Lieut. Conneman, as to the condition of the Arcona lines to the Ship, as to their being “taut or otherwise,” would indicate a positive personal knowledge on the part of each of them that the lines were constantly taut.

We think, however, that careful note will show that these assertions were based largely if not altogether upon *conclusions*,—testified to with positiveness because they assumed they *must be so* because *ordered so*. Capt. Nelson was not allowed to testify in this case that he *knew* the Helene put on full speed when he rang the engine bell for such speed, following which he received the telegraph signal back from the engine room, because it would be *hearsay*,—the argument made having been that he could only know the fact that full speed was put on immediately by the engineer *telling him so by use of the telegraph*. “How do we know,” counsel argued, that full speed was put on merely because Capt. Nelson gave the order for it and was told

by the engineer that the order was obeyed? (Tr., p. 2799.)

Let us review the testimony of the Arcona officers:

Capt. Schroeder said:

Direct 10: "I *ordered* the anchor chain of the Arcona to be heaved short. I do not remember what length, but until the hawser was taut (Tr., p. 382). "Then I *ordered* both hawsers to be made taut by heaving in the chain. * * * Then I *ordered* the hawsers *to be kept* taut all the time by heaving in the chain *as soon as the hawsers would slacken*. * * * I had hauled in about 25 meters of the chain from the time when the hawsers had been hauled taut" (Tr., p. 383). (Also see Tr., p. 398.)

Direct 30: "I know only that the hawsers were kept taut the whole time by that heaving in" (Tr., p. 387).

Direct 31: "They were kept taut" (Tr., p. 388).

Direct 36a: "During the three hours immediately preceding the floating of the *Celtic Chief* the steel hawsers which connected the Arcona with the *Celtic Chief* were kept taut by means of heaving on the ship's anchor" (Tr., p. 388).

Now, see cross interrogatory 41: "Referring to your answer to direct interrogatory No. 36a, state whether or not any part of the same relates to matters not done or observed by you in person, but is based upon reports made to you by your junior officers, or others, indicating what part or parts are stated upon such information? (Tr., pp. 375-6.)

And the answer: "Most parts of my statements are based on my own observations but of course I have not stood near the hawsers for three hours, especially not at about 11 o'clock when I went on board the *Celtic Chief*. The observations that

were not made by me *were reported to me* by my first Lieutenant who made them personally." (Tr., p. 396.)

Here we have, in the first place, admitted hearsay affecting the time covered by the last three hours. In the second place another erroneous statement of fact,—that his lieutenant who reported to him what he did not himself observe, made the observations *personally*. We shall presently show that they were hearsay, at least after *eleven o'clock*, even as to the Lieutenant himself.

What, we ask, did Capt. Schroeder really *know personally* about *that anchor chain being heaved upon* "as soon as the hawsers would slacken," during the last three hours? He did not point out any time whatever that *he* observed the anchor chain being heaved upon, and his whole testimony is therefore clouded with the uncertainty that necessarily affects most of it. Only in one place does he definitely say that he personally *saw* the hawsers "quite taut," namely at eleven o'clock just before he left for the Ship, at which time he again "*ordered them to be kept* so," and then after he was on the Ship (See Miller cross, Tr., pp. 398-9), but he has not said they were thereafter kept taut from any observation of his own.

Lieutenant Conneman also assumed to testify positively and apparently of his own knowledge, regarding the heaving of the anchor chain and the tautness of the lines.

Direct 30: "A continuous strain was exerted on both (lines) by heaving in the anchor chain of the Arcona." (Tr., p. 421.)

Direct 31: "Yes, the lines were kept taut continuously." (Tr., p. 422.)

Direct 36a: "By heaving in the anchor chain the Arcona's steel lines were kept taut continuously *during the three hours immediately preceding the floating of the Celtic Chief.*" (Tr., p. 422.)

I. I. S. N. cross 6 (part 6 of answer): "I have personally *taken care* that the lines were kept good and taut during December 8, 1909, from 6:30 in the afternoon *to eleven o'clock at night.*" (Tr., p. 425.)

I. I. S. N. cross 6 (part 7 of answer): "I have personally *watched* the various lines from board the Celtic Chief * * * from about 11 o'clock at night on. I have *seen* that the Arcona's lines * * * taut." (Tr., p. 425.)

Now, *how* did Lieut. Conneman "take care" and "watch" and "see?" We submit that these terms were used in the sense of his having been in charge and given the necessary orders and in that way "*seen to it*" that the heaving was supposedly done and the lines thereby supposedly kept taut,—because so *ordered*. We need go but one step further to show this: Part 8 of his answer to I. I. S. N. cross 6 (Tr., p. 425), was stricken because his statements as to the line being taut were manifestly hearsay. That answer, inadmissible as testimony, is still available for reference on the point of credibility as respects the rest of his evidence on the same point. In that answer it clearly appears that even when he used the word "*I know personally,*" he had no fair understanding of what personal observation meant.

This appears by his answer that he knew personally "as (i. e.—"because") I have *communicated the respective orders* of the Commander of the Arcona by means of a megaphone *from on board the Celtic Chief* to the Arcona and *I have received a reply* on every such occasion *that the order had been complied with.*"

As Lieut. Conneman was on board the Ship after 11 o'clock, he could not have made any *personal observations* to report to Capt. Schroeder, as stated by the Captain in answer to I. I. S. N. cross 411 (Tr., p. 396).

Again: Did Lieut. Conneman visually "watch" or "see" the Arcona lines, of whose tautness he has testified? He testified as above, to *watching* and *seeing* for the whole three hours. But we have another example of how he *saw* them taut: In answering Miller cross 6, which related particularly to the time before the first signal was given, he said: "The lines were kept taut continually. *About the position of the lines I cannot testify on account of the then existing darkness.*"

When Mr. Kennedy got up from his nap Wednesday night at about eleven o'clock "they were very quiet on the Arcona;" * * * "There didn't seem to be any stirring at all" * * * There was mighty few lights: * * * I saw one or two men parading back and forth on the ship. It was,—so far as appearance goes, from the position I had, it was evidently lifeless" (Kennedy, Tr., pp. 765-6).

Mr. Dowsett, prior to his taking his nap (at about 9:30) watched the Arcona's operations. During that

time he "couldn't notice anything because there was nothing doing, there was a deathlike stillness on board there" * * * "We could see her quartermaster on the after part of the deck. I did see him once, as I remember." There were lights aboard. (Tr., pp. 2091-2.)

The following further testimony indicates the inactivity mentioned:

Capt. Haglund: After the two wires of the *Arconia* were both connected, somewhere between 6 and 7 o'clock that evening, "Nothing more" was done. "Just put on wires, the strain on them alike" * * * "They were equalized as near as I could judge; they were both the same tautness, I think." Their position then was: "Oh, a big bight in the water. They struck the water at about a distance, I should think, forty or fifty feet from the different ships," with no noticeable difference at either end that he could remember (Tr., p. 2902).

And from this time (6 to 7 that evening), he said again, when asked if there was any change in the position of the lines after that, he answered "No, not up the time that the ship was floated off, there was no visible change to me" (Tr., p. 2908). "Q. How often did you observe them?" "A. Well, shortly before eleven o'clock I was in the boat and around *the Arconia*; saw her chain and saw her lines, and after I got aboard the ship, somewhere around eleven o'clock, then the searchlight was on, which made everything pretty plain; you could see from the *Celtic Chief* whether there was any change or not. I couldn't see none" (Tr., p. 2908). He passed within 20 or 30 feet from her stern in the boat (Tr., p. 2909). He said he "certainly would" have known it had the *Arconia* lines or either of them been made taut that night (Tr., p. 2909). He said further: "I could see them (after dark and before the searchlight came on) because

I was out in the boat and close by them. I could see them from the Arcona when I was aboard of her, and I could see the Celtic Chief end when I was aboard the Celtic Chief" (Tr., p. 2910).

Between a quarter of 12 and 20 minutes past twelve "They were slack, the same as they *were*; both slack in the water, probably about fifty feet from either end where they were fast. * * * I saw both of them. The searchlight was on them and lights of the Arcona, all kinds of light on her, and you could see the two ends perfectly well" (Tr., p. 2922).

(Note: Haglund *could* see both lines, being on the Ship, but those on the Mikahala could see only one line, on their side.)

Capt. Macaulay: "While I remained on the poop there, the whole afternoon and evening, taking in the situation as it was exactly, and I observed the Arcona's lines just the same as any other vessel that was pulling, came to the rescue of the ship. Just the same as I did the Inter-Island boats and the same as I did the Miller Salvage Company's gear" (Tr., p. 2314). And he observed the lines constantly (Tr., pp. 2293, 2299-2301).

"Q. Now describe the position of the Arcona's lines that evening with respect to the water?

"A. Well they were, the *Arcona was not pulling on them at all*. They were fast, the lines were fast to the Celtic Chief and also to the Arcona, and I suppose when the executive officer went on board and communicated with the commander, that they did all they could for the time being to assist the ship. *Ordinary strain* on the chain cable and also an ordinary strain on the wire. Nothing excessive.

"Q. Were her lines *in or out* of the water?

"A. *The bight of her lines were in the water*" (Tr., p. 2315).

"Q. Now, after they had gotten the Arcona into position and as she lay there at low water, *did*

she after that put any strain on her lines to pull on the Celtic Chief?

“A. Previous to her floating?

“Q. Yes, previous to her floating.

“A. *No, she did not.*

“Q. How do you know that?

“A. *Because I saw the line.*

“Q. How were her lines?

“A. *In the same condition as they were before*” (Tr., p. 2316). * * * I said before that the bight of the wires were in the water” (Tr., p. 2316).

“Q. Now did you notice the Arconia’s lines during the time the Celtic Chief *was first beginning her seaward movement?* A. I did.

“Q. How were they *then?*

“A. *In the same condition, only slackening up* as the Celtic Chief came astern.

“Q. They were slackening up? A. They were slackening up as the Ship went astern, and the Arconia’s wires slackened up.

“Q. And *during the remainder of the time* the ship was coming off, how were they *then?*

“A. *They continued to slack up*” (Tr., p. 2317).

“How were the lines of the Arconia at the time when the Celtic was, within say, a hundred feet of her?

“A. *They were MORE SLACK*” (Tr., p. 2322). “The two lines were very slack, laying down to a bight at that time” (Tr., p. 2322).

“*Afterwards* she towed the Celtic Chief, yes” (Tr., p. 2322).

“Q. Now, during that evening, during pulling operations, *could the Arconia have gotten a strain* on her lines and you not have known it?

“A. *She could not*” (Tr., p. 2325).

“*I noticed every movement of the Arconia* from the time she came out until the time she returned to Honolulu Harbor; after she let go the Celtic

Chief she went right into the harbor for the night" (Tr., p. 2328).

On cross-examination Capt. Macaulay, describing the process of equalizing the strain of the Arcona lines in the early evening, told how after again piecing one of the lines "they made that fast and got an equal strain" (Tr., p. 2509). Then questioned further as to the position of the lines, we quote as follows:

"Q. Were the two lines hanging clear of the water?

"A. They were forming a slight arch from the stern of the Arcona to the stern of the Celtic Chief.

"Q. A slight arch? A. Yes, a slight curve.

"Q. Do you mean they formed a bight in the middle which would touch the water? A. Oh, yes, it touched the water. * * * Not so very much. * * * *In the middle, in the center.* * * * They maintained the same position. * * * During the rest of the evening." During the last half hour "just the same" (Tr., pp. 2510-11).

As to the time after daylight he said "At times I could observe them by means of the Arcona's searchlight, then I could observe them *a certain distance* from the taffrail of the Celtic Chief, but I couldn't see the lines directly close up to the Arcona.

"Q. But you could see them from the Celtic Chief *down to where they touched the water*, from the Celtic Chief?

"A. *Pretty close.*

"Q. About half the distance, the point where they would touch the water? A. In the center?

"Q. Yes, in the middle of the line.

"A. *About the middle of the line*" (Tr., p. 2511).

In his judgment the testimony of other witnesses that during the last half hour "those lines were

hanging *absolutely slack down* in the water, the lines hung down from the stern of the Arconia into the water and hung down from the stern of the Celtic Chief into the water,"—"would be incorrect" (Tr., pp. 2511-12).

Because they were "*not quite as slack *** Not anywhere near as slack*" as that (Tr., p. 1833).

He even assented to the question: "Because they were hanging as you have already described them, with a bight in the middle, *slightly touching* the water?" (Tr., p. 2512.)

To this last phrase "*slightly touching*," adroitly inserted in the question last above mentioned, we wish to say, first, that the witness had said only that there was a "*slight curve*," and "*oh yes, it touched the water*" (Tr., p. 2510); and he had not said "*slightly touching*." We think also that when he was asked the question above: "But could you see them from the Celtic Chief down to where they touched the water," and answered "*Pretty close*,"—he meant they *touched pretty close* to the Ship, as he went right on to say "*about the middle of the line*" (Tr., p. 2511). This will be shown, we think, by the testimony given later on the same point and with respect to the same time, as follows:

"Q. During the half hour before the Celtic Chief moved off were the lines of the Arconia sagging in the water?

"A. What do you mean by sagging in the water?

"Q. Were they not merged, submerged in the water, at least part? A. Yes, *towards the center* they were.

"Q. *About how much of the center* if you can give a proportion?

"A. From the Celtic Chief rail or deck would be fifty feet of wire out of the water and the same would come from the Arconia's rail to the water, that would make a hundred feet out of the water. * * * That was the condition of the line" (Tr., pp. 2639-40).

And on recross-examination Capt. Macaulay said that was what he meant when he testified "that the middle of the line was under the water" (Tr., p. 2654).

See again, his testimony on page 2539, where he said he knew the Arconia wasn't pulling and had no strain. He was positive of it.

While, therefore, taken as a whole, Captain Macaulay's testimony is not as strong as that of the other witnesses as to the *absolutely slack* condition of the Arconia lines, he is absolutely firm on the point that she *did not pull, and had no strain, and never moved*, until the Ship was afloat. In this, his testimony on other points than the simple condition of the lines (which is all for which the citations have thus far been made), will make the conclusion complete.

Captain Tullett:

The Arconia having gotten those two lines fast, between six and seven o'clock, "didn't do anything after that" (Tr., p. 2666).

One of her lines ran over the Mikahala lines (which came out at the starboard quarter chock) and went into the Celtic Chief through the midship chock on the starboard side of the Celtic Chief (Tr., p. 2666). (See to same effect the testimony of Piltz, Tr., pp. 1873, 1792, and Lewis, p. 3244).

This line Tullett could see from the Mikahala, and it "came from the midship chock along the side of the vessel over my line and then dropped down into the water" (Tr., p. 2666).

The other line, to port of the ship, Tullett could not see from the Mikahala that night (Tr., pp. 2667-8).

The position of *both* lines, at the stern of the Arcona "was *very similar* to the line that I saw leading from the Celtic Chief. It dropped down from the stern in the water probably about forty or fifty feet from the ship" (at the Arcona end). (Tr., p. 2667).

At the Celtic Chief end, the line that he saw: "I should say after it crossed my line where it dropped into the water there wouldn't be more than thirty feet in view. Thirty feet of the line in view" (Tr., p. 2667).

"Q. How frequently did you observe the Arcona's lines that evening, after the two were made fast?

"A. I observed them when the electric light came on. They were *in the same position then as they were before*. At the Celtic Chief end" (Tr., p. 2667).

Regarding any change of position of the lines "during the entire evening including the hour when it was dark," he testified "There was no change in the position. * * * Because had there been any change the position of the Arcona would have changed with it" (Tr., p. 2669). And also: "Outside of the reason that I have just stated, if there had been any work on her lines on board the Ship, I was observing the Arcona and the Celtic Chief the whole time from dark until the ship finally came off, I certainly would have seen them working their lines, and the only possible difference on the lines that could have taken place would have been the slack of the lines. There was no

possible chance of the lines coming tighter without the relative positions of my vessel and the Arconia changing; that I can state positively and prove it" (Tr., pp. 2670-1).

And on page 2673: "Q. Could the Arconia have gotten a strain on her lines without your having known it? A. No."

"I'm positive that the Arconia did nothing" (Tr., p. 2703).

Each time he saw the Arconia's line it was in the *same relative position* (Tr., p. 2703).

"I noticed her line over my line. * * * At the Celtic Chief. I had (a) particular object in watching that. * * * And that's the only place I observed it to take any notice of it" (Tr., pp. 2707-8).

Captain Piltz:

Captain Piltz left the Ship for the Mikahala at 11:30 (Tr., p. 1783).

"Her lines when I left the vessel were slack in the water" (Tr., p. 1791).

"The Arconia's line that passed to the *port* side of the Celtic Chief I did not see *where* that entered the water, but on the starboard side of the Celtic Chief, why *it entered the water abreast* of the quarter of the Celtic Chief" (Tr., p. 1791).

The Arconia line (there) led over the Mikahala's: "that's why I parcelled the line previously" (Tr., p. 1791).

"Q. About what angle did that line describe in coming toward the water from the point where it crossed the Mikahala line?

"A. It went directly up and down. It *slanted* up and down so there was no strain on it.

"Q. About how many feet do you think it was from the Celtic Chief to the point where the Arconia line entered the water on the starboard side?

"A. About ten or twelve feet" (Tr., p. 1792).

(Note: We think, from his other testimony, he meant here 10 or 12 feet from the *side* of the vessel at the water line).

He did not observe this line at the Arcona end (Tr., p. 1792).

“Q. You say you didn’t see the port line?

“A. *It was not out of the water.* If it was out of the water *I would have notice(d)* it, the Arcona’s line that was attached to the port side of the Celtic Chief.” (And repeated). (Tr., p. 1792).

“Q. Did you, at the time that the Celtic Chief came off and immediately prior to that, did you observe the Arcona as she lay there?

“A. Yes, sir, I did. I noticed that she wasn’t doing anything.

“Q. How?

“A. Her engines wasn’t moving, there was no churning of the water directly from her stern, *and her lines were slack and hanging in the water.*” (Tr., p. 1793).

“I never noticed any difference (in her lines) from the time they had them fast until I left the ship.” If there had been any difference he said he would have noticed it. (Tr., p. 1804).

He parcelled the Mikahala lines between seven and eight o’clock, nearer eight, “and at that time the Arcona’s line was hanging loosely over the Mikahala’s towing line” (Tr., p. 1988).

And as far as he knew it was in that same position until the time she came off (Tr., p. 2000).

Captain Nelson:

After the Arcona’s two lines were connected, about seven o’clock, the Arcona did nothing further except to play her searchlight, and he could see parts of the lines at various times. Any time that he looked he could see them he could distinguish no change. (Tr., pp. 2780-81).

"Up to about seven o'clock in the evening after they got their lines fixed and stopped operations I didn't see any change in the lines."

"Q. If there had been any change would you have noticed it?

"A. I think that I would, yes, sir.

"Q. That is if those lines had been pulled up taut?

"A. *If the lines had had a strain on them so as to bring them about (above) the surface of the water I would have seen them somewhere between the stern of the Arcona and the Celtic Chief.*

"Q. As it was, how much of those lines, you say was out of the water where they left the stern of the Celtic Chief?

"A. Well, *there might have been forty or fifty feet* of the length of the wires. She was somewhere about twenty feet out of the water astern and they went down on an angle say of—I couldn't say. They went down so that they *looked to be leading to the bottom.*

"Q. And at the Arcona end approximately how much?

"A. I think there was less because her stern was lower down, but they led right down into the water. They didn't lead straight out as a line that was taut would lead." (Tr., pp. 2781-2).

"Not up and down. It hung at a small angle, say forty-five degrees for the sake of argument. * * * It was at a small angle out from the vessel's (the Arcona's) stern" (Tr., p. 2822).

(Note: The witness did not say on direct that the stern of the Arcona was twenty feet high above water, as indicated by counsel on page 2823; he said the Celtic Chief stern was about that, and the Arcona was lower down (Tr., pp. 2781-2).

Mr. Dowsett:

"They were running from the stern of the boat (Arcona) from the top of her poop deck in a

loose and slack bight. * * * They never changed their condition from first to last as far as my observation went" (Tr., p. 2091).

He made observations until going to take his nap. When he got up and noticed them again (Tr., p. 2093) they were "unchanged from what they were." And after that "They never changed. There was no change whatever * * * up to the time the vessel came off" (Tr., p. 2094).

On cross-examination, counsel suggested to the witness that the Arcona lines came from either side of her from chocks some 30, 40 or 50 feet forward of her stern" (Tr., p. 2122); and the witness rejoined that that may have been, but he saw the lines, "the way they went down against the side of the vessel—alongside"—but they nevertheless appeared to him further astern than indicated by counsel—they were "over the stern, if anything—the stern or to one side" (Tr., p. 2122). She had a rounded stern and the line went over, but not "directly" over (Tr., p. 2123). It was "very little forward."

"I saw the line going down into the water. I remember that quite distinctly. * * * Straight at an angle," and struck the water about 10 or 12 feet from the hull of the Arcona (Tr., p. 2124).

"Q. I understand you, Mr. Dowsett, to say that those lines used by the Arcona hung down at a very steep angle into the water, almost dropped down absolutely straight into the water from the stern of the Celtic Chief (Arcona)?

"A. Yes, they looked so to me; as if they were almost hanging over her stern there loose. * * * About a few yards away from the vessel where they hit the water. * * * To better explain it, and if my memory serves me right, the wires came out and formed a curve went out and down to the water.

(Mr. Warren: Indicating a *convex* curve).

"Yes, convex curve like that" Tr., p. 2152).

"I'm absolutely certain that she wasn't pulling"
(Tr., p. 2156).

Mr. Lewis:

"I could see a line rather indistinctly from the —leading north from the stern on the port side of the Arcona; that line to the best of my recollection running down the side of the Arcona into the water. * * * The line as it entered the water did not make a very acute angle. I should judge that it was in the neighborhood somewhat, oh, anywhere from along about thirty feet * * * from where it left the vessel's side * * * to where it hit the water. The line approached slightly the perpendicular, more the perpendicular than the acute. * * * I saw *one* to the best of my recollection, the only line that I could see" (Tr., pp. 3222-3).

The time covered by the answers above was from 9:15 to 10 P. M. (Tr., p. 3223).

During that time he saw indistinctly a line which he took to be the Arcona's leading up to the starboard side of the Ship (Tr., pp. 3223-4).

During that entire period he saw no change in the lines (Tr., p. 3224).

Having taken a nap and come out again between 11:15 and 11:30 he saw that "There was absolutely no change in the Arcona from the time that I came out between quarter past nine and eleven thirty and when I retired at ten o'clock. * * * The lines were *exactly in the same position* as they were and which I had noticed prior to my retiring, that is the line leading down over the side of the Arcona went into the water near the perpendicular and coming out on the other side, on the starboard side of the Celtic Chief also entered, came out of the water and approached the side near the perpendicular" (Tr., p. 3225). (Repeated in part on pages 3226-7).

As to how much of the line was out of the water at the Celtic Chief end, he didn't want to give the exact number, but said "somewhere between say 40 and 60 feet; that is, beginning from where it entered the side." (Tr., p. 3227).

"I saw no change" (Tr., p. 3228). And see Tr., p. 3230.

Respecting the Arcona line at the Celtic Chief, "it seemed to run along, it seemed to be over the Mikahala's line and entered the Celtic Chief up over the side" (Tr., p. 3244).

(Note: This shows clearly the witness was not mistaken in taking that line for the Arcona line when he saw it less distinctly earlier in the evening).

From his position he could not say whether this line entered the water at the Celtic Chief inshore or offshore as respects the stern of the Ship (Tr., p. 3247).

Mason:

"Might be she had the lines in length, but she wasn't doing nothing at all." (Tr., p. 929).

Bringing them "to an absolutely taut position" — "*didn't happen*" (Tr., p. 929).

"Q. Just put her lines aboard and hung slack?

"A. Yes.

"Q. She didn't even draw them out of the water?

"A. She didn't (Tr., p. 929).

And see Tr., pp. 933-4.

"Her lines were slack from the time she dropped that anchor to the time we got the vessel off. That is the time I see them start up" (Tr., pp. 929-30).

Kennedy:

Said himself there are other ways of pulling a ship besides turning propellers, but said of the

Arcona "If she was pulling it wasn't manifested in the tautening of the cable" (Tr., p. 774).

And see Kennedy, Tr., pp. 761, 765-7, 773-4, 783-4, 796, 797-9, 799, 809.

The line to port side of Celtic Chief:

"If it was taut we would have a chance to see it. * * * Because if it had been taut it would have been down less" (Tr., pp. 785-6).

Also:

See Clarke, Tr., pp. 1098, 1101-2; Miller, pp. 1376, 1570-1; Makalena, pp. 1339-40.

Independently of the testimony on the subject of the condition or position of the Arcona's *lines*, as bearing on the question of whether or not she contributed to the salving of the Ship, we rely upon two other factors, proving her absolute inaction. The first of these is that except for the one time when she broke her line some time between two and three o'clock that afternoon she did not at any time or for any purpose use her propellers—and they were not used until after the Ship was off and close up to the cruiser, and then only to get away herself and later tow the ship into deep water; and the second factor is that she did not do any heaving on her anchor chain, this being the only other way she could have exerted power aside from her propellers. These two points will be taken in the order suggested:

The Arcona did not use her propellers:

We might continue to make numerous and lengthy quotations from the testimony at large, to prove this fact, but inasmuch as the hopes of the Claimant were shattered in this regard on the production of the deposi-

tions of the officers of the cruiser herself, we will go the least possible length to indicate the proof:

The officers of the Arcona do not claim that the engines were used; their claim is that their lines were kept taut by heaving on her anchor chain. The claim as to heaving will be taken up shortly hereafter.

Captain Schroeder, in answer to I. I. S. N. cross-interrogatory No. 35, said:

"I do not remember if a signal was given because the engines of the Arcona were not moved before the Ship came off, but I remember that the steamers moved their engines at full speed from about eleven o'clock (Tr., p. 395).

Lieutenant Conneman, answering I. I. S. N. cross-interrogatory No. 19x, said:

"A fixed time for the commencement of working the Arcona's engines had not been proposed except in case the floating of the Celtic Chief could not be accomplished by means of heaving in the Arcona's anchor chain. We did not need to resort to it as we succeeded in floating her in the manner last mentioned before that time" (Tr., p. 434).

As indicating further that the cruiser did not use her propellers, we cite the following additional answers tending to show the claim of the witnesses here that the Arcona power was by means of heaving on her anchor chain:

Captain Schroeder's answers to: Direct No. 10 (Tr., pp. 382-3; Direct No. 30 (Tr., p. 387); Direct No. 36a (Tr., pp. 388-9); and Miller Cross-ex. No. 14x (Tr., p. 398).

Lieutenant Conneman's answers to: Direct No. 23 (Tr., p. 420); Direct No. 36a (Tr., p. 422); and Direct No. 38 (Tr., pp. 422-3).

For additional references to testimony in the transcript, that her propellers were not used, see:

Captain Henry: Tr., 103, 192-3, 212; Lonche, p. 515; Weisbarth, pp. 608-10, 632, 635, 637.

Captain McAllister: Tr., p. 87; Kennedy, pp. 762; 774-5; Bray, p. 861; Mason, p. 900; Piltz, pp. 1791-3, 2085-6; Macaulay, pp. 2315, 2510; Tullett, p. 2671; Haglund, p. 2910.

The Arcona did not heave on her anchor chain:

It being therefore clear that the Arcona could not have had any part in the pulling off of the Ship, so far as any propeller power is concerned, we turn attention to the only possible means she had left, namely, heaving on her anchor chain. And we submit that the record shows not only that she did not heave, but did not even intend to do so that night.

Notwithstanding the testimony of the officers of the Arcona that her lines to the Ship were kept taut by heaving on her chain, as indicated above, we submit that from all of the testimony aside from theirs she did not heave and could not have heaved on her anchor chain *because*, if she had done so, *she would have changed her position, and she did not do so.*

Mr. Kennedy:

Defined the position of the Arcona at eleven o'clock that night; with relation to the Mikahala, as:

"In the position of the Mikahala she was just lying at the stern of the ship (Arcona). * * * In

the stern of the Arcona on the side." "Perhaps 200 feet" between the Mikahala and Arcona. (Tr., p. 762).

"The Arcona wasn't moving. * * * We were watching her" (Tr., p. 766).

Referring to when the Celtic Chief had been pulled aside by the Mikahala, he said:

"Well, by this time then when she pulled thoroughly around the Arcona people got a move on" (Tr., p. 769).

"Q. Had she changed her position?

"A. (Not) until the Ship was on top of her so far as observation goes" (Tr., p. 775).

"Q. She might have, had she attempted to do so, exerted a strain on her lines by means of heaving in on her anchor?

"A. She could do it, but the lines so far as observation from the Mikahala, didn't show that she was doing so.

"Q. She could have done so?

"A. She could have done so.

"Q. And might have exerted a strain by means of her anchor?

"A. If she was doing that—

"Q. Do you think she could have?

"A. I don't think so because they—" (and here counsel shut off the adverse answer coming by changing the subject). (Tr., p. 775).

Compare the above with his further testimony, when, having said that the Celtic Chief made her first rapid move, coming say half her length, about a hundred feet (Tr., p. 783), and it was fifteen or twenty minutes before she moved again, he testified:

"Q. You still observed that the Arcona's lines were lying loose?

"A. Yes.

"Q. Never made any change at all the whole fifteen or twenty minutes?

"A. They were still lying down.

"Q. No change whatever?

"A. No change whatever so far as I could observe.

"Q. Even though the Celtic Chief had decidedly moved fifteen or twenty minutes before?

"A. That's my impression. At least *if they did they didn't take enough of the slack in to show*.

"Q. Let me ask you, Mr. Kennedy, when this sudden jump occurred, when was it that you had observed the condition of the lines of the Arcona with reference to that point of time?

"A. *We were doing nothing else but watching her lines* from half past eleven right on, somewhere about half past eleven, I should judge. All we had to do was to observe these lines on the ship." (Tr., pp. 783-4).

"Q. Now then, Mr. Kennedy, isn't it probable that the Arcona pulling on her lines or heaving in on her anchor chain *whenever the Celtic Chief would come*, at times her lines would slacken up and other times they would be taut so that your observation would not go to the extent of saying that she was not pulling?

"A. Well, it *might* be, but *it would require a good deal to convince me*.

"Q. Nevertheless it might be so?

"A. Yes, *it might be so, but I would be very doubtful about it*" (Tr., p. 798).

* * * So far as any outward manifestations were concerned; so far as we could observe from the outside. * * * Unless there was some demonstration to lead me to believe that they were doing the contrary, and there was none observable to me." (Tr., p. 799).

"No, I did not see the Arcona line at all except hanging down the side of the ship" (Tr., p. 809).

Captain Piltz:

Defined the position of the Arcona as being: "Her stern was about abreast of the bow" of the Mikahala (Tr., pp. 1967, 1788, 1834); her stern more toward the Helene than her bow (Tr., p. 1972); she was pointing more easterly than the Mikahala (Tr., p. 1981), not directly in line with her towing lines, as she had a bit of an angle to the eastward (Tr., pp. 1981, 1987). After the Arcona got into her position the distance between her and the Mikahala was between 150 and 200 feet (Tr., pp. 1788, 1984). She *maintained that position* from dusk on Wednesday afternoon until the Celtic Chief came off Wednesday night (Tr., p. 1971). "The Arcona did not move her position" (Tr., p. 1793); she did not move until about ten minutes *after* the Ship was floated (Tr., p. 1794).

When the ship began coming the Mikahala then pulling, the Mikahala forged ahead with the Ship and *gradually* got abreast of the Arcona, which lay still (Tr., p. 1985), and so continued until the Arcona instead of being ahead of the Mikahala as they were before the Ship began to come, was finally astern of the Mikahala (Tr., pp. 1793, 1992, 2031).

Had she put any strain on her anchor chain, to heave and pull on the Ship she would, on account of her anchor lying out ahead of the Mikahala (as hereinbefore indicated in this brief) have necessarily brought herself into line between the Ship and her anchor, and as the Mikahala was herself directly in that line (according to the testimony mentioned) the Arcona would have come gradually closer to the Mikahala, and, as her stern was in the first place a little seaward of or in line with the Mikahala's bow, the Arcona would herself have been ahead of the Mikahala, and in the same line from the Ship to the Mikahala extended,

and the Arcona line would have come up against or under or over or have fouled the Mikahala (Tr., pp. 1787, 1831, 1833, 1929-30).

Note further that the witness makes a distinction between "heaving" and "pulling." When he said that had she pulled she would have gone out to sea (Tr., pp. 1834, 1983) he meant with her propeller. On pages 1983-4 he said she could have "pulled" and kept a strain on her hawsers without interfering with the Mikahala—but she didn't pull.

Mr. Dowsett:

Made a sketch of the relative positions of the Mikahala and Arcona (Tr., pp. 2136-7), making a change in the position of the Arcona when he found he had gotten it pointing too straight to sea (Tr., pp. 2138-40). This sketch will speak for itself. And see Tr., pp. 2089-90.

Thereafter she was in the same position (Tr., pp. 2094, 2152) while the Mikahala moved forward (Tr., p. 1489) and got abreast of the Arcona (Tr., p. 2143).

Captain Macaulay:

Also made a sketch of the position of the Arcona (Tr., p. 2313) which she maintained thereafter; during the rest of the evening. (Tr., pp. 2510-11).

"If she had hove an extra strain on her lines and chain cable it would (not) have altered the ship's (Arcona's) position. * * * to the southward and eastward * * * on account of where she had laid her port anchor" (Tr., pp. 2316-17).

Reference to the transcript will show the word "not" to have, apparently, been part of the witness' answer just quoted. This is only one of the multitude of errors

of the reporter, and we know the word "not" was used, as will clearly appear by his further testimony which follows:

"Q. How far from that would she move?

"A. She would move ahead *until the anchor would be in line with the keel of the ship.*

"Q. That would bring her where?

"A. Her bow over the southward and eastward.

"Q. And how with respect to the Mikahala?

"A. *She would then be on a line of crossing the Mikahala's bow.*

"Q. *Did she move out of that position you have indicated on this map at any time during that evening?*

"A. *She did not.*" (Tr., p. 2317).

Captain Tullett:

Made a sketch showing the position of the Arconia and her anchor chain, with respect to the Mikahala (Libellant's Exhibit H). When she took up that position indicated by the sketch she did not thereafter change her position in any way during the operations (Tr., pp. 2659-61, 2665, 2669-70).

The Mikahala moved out (Tr., p. 2677).

Had there been any change of position of the Arconia lines the Arconia would have changed with them, because her anchor was where it was. Her lines had been taut enough to keep her in position, but had she left (hove) them taut she would certainly have come closer to the Mikahala (Tr., p. 2670). "If she hove until she got her lines taut to the Celtic Chief she would foul the Mikahala" (Tr., p. 2671).

Captain Nelson:

Viewing from the Helene the position of the Arconia had it fixed with reference to the buoy of

the Miller anchor, which was almost in line with where he was on the upper deck of the Helene (where he was most of the time) and the quarter deck of the Arcona, and about 50 feet away from the Arcona (Tr., p. 2782).

He could see that buoy all the time, and its relative position to the Arcona did not change at any time as far as he could see (Tr., pp. 2782-3). The Arcona didn't move until the Celtic Chief was almost on top of her and then they steamed away quick. (Tr., p. 2783).

Captain Haglund:

Not up to the time Ship was floated was there "any visible change" to him.

He went out in a boat, passing among the vessels, going from the Helene to the Mikahala and vice versa, and in that way went "right up against the Arcona's stem with the boat and possibly *within two or three feet of her anchor chain. It was hanging perpendicular altogether* at that time" * * * "on the port side" (Tr., p. 2909). "At that time" was "shortly before eleven o'clock" (Tr., p. 2908). He put his hand on the stem of the Arcona (Tr., p. 2909). He also passed within 20 or 30 feet from her stern (Tr., p. 2909), and would certainly have known it had her lines been taut (Tr., p. 2909).

"She did not" heave on her anchor chain at any time that night. Asked how he knew this, he said that part of the time that night he was aboard of her (Tr., p. 2909), a little before ten o'clock. As to other times "if she had heaved on her anchor chain at any time that night * * * it would have altered her position," on account of her anchor being away off to windward—"it certainly would have brought the Arcona closer up against the Mikahala" (Tr., pp. 2909-10).

She did not change her position at any time after six o'clock that night until the ship came off. She could not have changed her position without his knowing it "because I was there all the time" (Tr., p. 2910). "If she had used her propellers she would have tightened up the wires, which she didn't do" (Tr., p. 2910).

Captain McAllister:

"She lay still" (Tr., p. 97).

McAllister was on the Interpid, anchored out westward of the Helene, at a point where the Helene cut off his view of the anchor chains of the Arcona (Tr., p. 98), but he could see her stern and the Miller anchor buoy (Tr., p. 97). He said he knew the Arcona was not heaving on her anchor chains because in that case "she ought to have left the division between the vessels, the space, which she did not." He said that from his position he "certainly could" tell that she did not heave on her anchors, as *he* was "laying still" (Tr., p. 97).

Counsel for the Claimant was willing to admit, to prevent any exact inquiry from Captain Henry of the way the Arcona moved when the Ship came off, that the distance between them "very materially diminished" (Tr., p. 193).

Captain Henry:

Could not say whether the cruiser did anything after the first or second signals (Tr., p. 218).

Add to the testimony itself the argument: That had the Arcona in any way have gotten her lines taut to the Ship, by heaving on her anchor chains, it is elementary that there would be just as much strain, in pounds, at every point in the line between the Ship and the Arcona *anchor*, and consequently as much strain

on the chain, in pounds, as on the lines astern. Then, on the Ship coming off the reef and floating free, and the lines coming *slack* down loose—doubling up and circling on the bottom—as they must have by the time the ship got so much nearer the Arcona (as will subsequently be indicated)—the absolute relaxation of strain on the lines astern would have been eased off by the Arcona moving forward toward her anchor. Her position would necessarily have changed immediately and rapidly in the direction of her anchor. But, by all of the testimony, she *did not move* until the Ship was very close to her.

The trial Court observed that the Mikahala's anchor was also laid to her port "side" (meaning, surely, to port of the direction of her bow), as far over to port as was the Arcona anchor (Tr., p. 3361). Nevertheless, when the Ship first began to come, some moments before she came free, the Mikahala "was out already and to the port side further when (where) the Arcona was through heaving up the anchor" (Tr., p. 2677). *She* was able to move over and did move over when she hove on her anchor. It was not until the ship was soon thereafter *afloat* that the Mikahala changed for the side pull (Tr., pp. 2677-8).

Counsel thought to negative this argument by showing that Miller's *anchor* didn't move seaward when the Ship came off (Tr., p. 255). We will match the point there by admitting that neither did the *Arcona's anchor* move seaward. But if she had had *any* strain on her anchor *she* would necessarily have moved

toward it upon any lessening of the strain on the *rear* line. Yet when the Ship came off the Arcona *didn't* move forward.

Finally, however, it is not within reason to argue that the Arcona, even if she *had* heaved on her anchor chain, as maintained by her commander and executive officer, she could have done more than a small share of the pulling which took off the Ship. Any strain by her could not have exceeded the horsepower—not of her propeller, but of her anchor winch; and we have absolutely no evidence of what that power might have been. The heaving, if any, was not on either of the lines directly, but on the anchor chain (Tr., p. 383). It cannot be presumed that her anchor winch was of any greater power than reasonably or usually required for its purpose—to handle a 2.48-ton anchor (see below). And however powerful her winch may have been, its usefulness would still be limited by the holding power of the anchor. The Arcona had two anchors on board, their weight being 2,250 kilograms each (Schroeder, Tr., pp. 381-2), *but she only used one of them* (Schroeder, Tr., pp. 386, 392; Conneman, Tr., p. 420). As 1 kilo equals 2,204.6 pounds, the Arcona anchor weighed 4,960.3 pounds, or 2.48 tons. Conneman thought the Arcona had out about 85 meters (equals 276 feet 2 inches, or 46 fathoms) of anchor chain (Conneman, Tr., p. 428). To arrive at the weight of this 46 fathoms of Arcona anchor chain we must, for lack of anything else in the record, make a fair comparison with the Helene anchor chain. The He-

lene carried anchors of about 2,000 pounds each, or one ton, and the Arcona anchor was 2.44 tons. For her one-ton anchors the Helene used anchor chain weighing 128 pounds per fathom (Haglund, Tr., 3066): Surely double the size anchor chain of the Helene is almost doubly generous as an allowance for the Arcona chain, but, taking it as *double*, 46 fathoms of Arcona chain at 256 pounds per fathom would weigh 11,776 pounds. *The Arcona anchor and chain, together, therefore, weighed 8.318 tons.*

We have already, in a comparison of holding power between the Helene's anchors and Miller's anchor shown that *the Helene had out a weight, in anchors and chain, of 11.6 tons* (See page 84 of this brief).

It cannot be said, then, that the Arcona, with 8.318 tons weight out, to heave on for pulling purposes, had any advantage in that respect over the Helene, with 11.6 tons out ahead to heave upon—the *Helene using her propeller in addition*, and the Arcona *not* using her propellers. Captain Schroeder thought the Arcona had out about 100 meters of anchor chain (Tr., p. 392). That would add 15 meters, or 48 feet 9 inches, equal to about 8 fathoms, which, at 256 pounds per fathom, would add 2,048 pounds, or about one more ton to the weight out ahead of the Arcona; *i. e.*, it would give the Arcona 9.318 tons against the Helene's 11.6 tons. Besides, the Helene had the advantage of the far longer chain out, which is a large advantage, as heretofore indicated, and could therefore have exerted greater power on her anchors before

bringing them home than the Arcona anchor could have withstood. The Arcona witnesses could not tell the power of her capstan, nor how much strain was put on her anchor chain (Schroeder, Tr., p. 387; Conneman, p. 428); and on the other hand, the Helene's anchor capstan was 45 H. P., to which, by her propeller, she could add 3.11 tons.

Captain Haglund testified that all the power that could safely be put *was* put on the Helene anchor chains (Tr., pp. 2894-5). There was nothing special about the character of the Arcona anchor winches. They were "for weighing anchors" (Schroeder, Tr., p. 381). And see "one anchor winch" (Conneman, Tr., p. 417).

Captain Schroeder admitted in effect that he could not say *what power* moved the Ship, "several strains being in action to pull that ship, *i. e.*, the hawsers of the Arcona, the cables of the steamers, and that steel cable leading to the seven-ton weight." (Tr., p. 397).

It may further be said that the mere fact that the Ship in coming off the reef headed toward the Arcona does not warrant any claim that the Arcona—or Miller's anchor—pulled her off. She would naturally have moved that way, with the Inter-Island steamers balancing each other (see Tr., p. 3154) and pulling from both sides of her stern (Tr., pp. 802, 805).

Again, *if* the "high tide coming in might have been the cause of the starting of the Celtic Chief" (see counsel's question, Tr., p. 2153), then, we reply, the credit still belongs to the lighterers—not the Arcona.

Moreover, we have said that the Arcona did not even intend to pull that night. Finding Haglund obdurate, and intending to pull toward midnight, signals were made up between them.

Before the Arcona's advent, it appears that by the Inter-Island program, understood by Captain Macaulay and Captain Henry, when the Ship was floated the Mikahala was to take care of her. After the Arcona came out her commander wanted this privilege—the gallery play (Tr., p. 2318), and, Captain Haglund being informed of it later, went on board the Arcona that evening to confer about it to prevent any misunderstanding in maneuvering (Tr., p. 2911).

Captain Haglund tells us that having gone on board the cruiser, he went to the room of the executive officer and the latter "expressed a very strong desire for to *delay operations* until daylight—'so we could see what we were doing,' he said. I told him we couldn't do that. We had to try to take the ship off at the first opportunity. That was (to be) at high water, which will be after midnight that night, so *he said he was in no position to tow because he knew that he would break his small wires* that he had out, and furthermore that he didn't like to cut them * * * He didn't like to cut them and *he was afraid if he start the engine and break them, as he was pretty sure he would, that he would get them tangled in his twin-screws, so that arrangement (was made) for the signals to be given as I got here.*" (Tr., p. 2913). And see Tr., p. 3367.

Captain Haglund then produced the identical paper, written by the executive officer at the time (Tr., p. 2913), which paper is in evidence at Libellants' Exhibit "N" (Tr., p. 2915).

Thus, even at the critical time, when the floating of the Ship was reasonably to be expected on the midnight tide, the Arcona wanted to wait until morning. For losing a tide salvors have been penalized.

The Diadem, Fed. Case No. 3874;

Roberts vs. St. James, Fed. Case No. 11914.

It was further arranged between the executive officer and Captain Haglund that night on board the Arcona that the Mikahala line should be cut last to permit her to sheer the Ship and prevent getting in the cruiser's screws: "That was agreed upon between myself and the executive officer because he was kind of timid about his twin screws and his two wires, so I agreed with him that the Mikahala will be the boat that won't be cut away until the Arcona was safely clear, which was carried out" (Tr., pp. 2919-20).

Here we wish to mention that Captain Haglund, in agreeing to cut the Mikahala line last, did not mean that this arrangement might be accepted as relieving the Arcona from any necessity of moving herself at all, and that the Mikahala was to be insurer of the safety of the Ship and the Arcona. This visit was made prior to the time the hard pulling was to begin. The paper that Captain Haglund brought into court, prepared by the executive officer himself, shows on its face that there were to be signals for pulling full speed

and special signals for the Arcona's benefit, to advise when the Vessel started, and when it moved rapidly, and when afloat. We can see no object in arranging signals of that kind, unless to allow the Arcona to know when to pick up and move. It cannot be said that Haglund would even suspect that the Arcona would lie absolutely dormant and do no pulling at all. Haglund would certainly be justified in expecting, when he arranged this with the Arcona, that the Arcona would do *some* pulling when the tide had come higher; and, with *any* pulling, even by chain heaving, the cruiser would certainly have gone forward some distance at least. Captain Haglund was merely by his agreement to cut the Mikahala last, giving the Arcona officer the benefit of the assurance that the Inter-Island Company would not, by insisting upon pulling that night, unnecessarily jeopardise the propellers of the cruiser on account of wires and lines in the water.

Were this not the case, Captain Haglund would not have become uneasy at the inactivity of the cruiser or thought it necessary to urge the Arcona officer, as the Ship was coming off, "Ain't you going to start your engines?" (Tr., p. 2916).

When the ship was making her final rapid move off the reef, Captain Macaulay noted the inactivity of the Arcona and said to the executive officer, "Why don't you steam ahead?" (Macaulay, Tr., pp. 2528, 2530); * * * "steam ahead with your ship"; and the answer was "*We can't* steam ahead." Macaulay then said "Heave away on your anchor, *do something* to

get away"—and they heaved on their anchor and then went ahead with the propeller (Tr., p. 2535). At that time Captain Macaulay said he "was under the impression that the Arcona was ready at any instant to give assistance to the Celtic Chief" (Tr., p. 2534). Therefore, not until matters looked serious did he so approach the officer. This phase of the operations was further testified to by Captain Macaulay when he gave the explanation why they couldn't steam ahead. "He said he couldn't do it on account of being afraid of getting his heaving lines in his propeller" (Tr., pp. 2539, 2562-3).

Captain Haglund says also (as above indicated) that when he noticed the ship approaching the Arcona pretty closely in coming off, he went up to the executive officer and said, "Ain't you going to start your engines? Anything happen to Mikahala hawsers, there might something happen"; to which the officer replied, "I just give the signals to start in." He fired three white stars. "That's how I found out what them *white* stars were for." (Tr., p. 2916).

Again, when the cruiser once started up her engines, she evidently wanted to get her lines out of the water and get out of that vicinity. Mr. Kennedy says she "got a move on" (Tr., p. 769); Tullett says "all at once" (Tr., p. 2677), etc.

When the Arcona started off seaward with the Ship she kept going until at about three-quarters of a mile Captain Macaulay asked the executive officer to please turn around more eastward toward the anchorage. "We

were going at a rapid rate further out to sea" (Tr., p. 2323).

"He informed me that the commander said that he didn't wish to turn the ship on account of fouling his propeller with those lines. I suggested that he would let go one wire, one wire was sufficient to tow the ship, and they did let go one wire," which the Ship hauled in. "Then he swung his ship and went slow, but in approaching the anchorage, after making this great big circle he hailed, the commander of the Arcona hailed his executive officer and he told him he did not wish to pull any more, that he wished to let go his line entirely. The executive officer told me what the commander wished. I said, "Why, we are *in the open sea* and if you're going to let go your line after making an arrangement to tow the ship to an anchorage, (—) the thing is impossible if we have no Inter-Island boats" * * * "He replied that he *had to carry out the commander's orders and let go the line*. The boat's crew came from the Arcona and took the executive officer on board his own ship, and that was the last that I had anything to do with the Arcona." (Macaulay, Tr., pp. 2323-4).

Captain Haglund shows, again, the disposition of the commander as respects the safety of the Arcona versus the safety of the Ship. He says "He (Captain Henry) asked me if I would give him a steamer, *as they had to let go, as the Arcona demanded her wire let go* from the Celtic Chief" (Haglund, Tr., 2924). Captain Haglund said, "I told him yes, after the Arcona wire

was gone" (Tr., p. 2924). Apparently Captain Haglund didn't want to share any more responsibility for the ship while the Arcona was executing her "simple nautical maneuvers" (as Conneman, Tr., p. 433, described them).

We find other points wherein we submit a doubt is thrown on the reliability of the testimony of the Arcona officers, as to their pulling on and moving the Ship, compared with the time she first moved.

Captain Schroeder, answering direct interrogatory 10, said that he ordered his hawsers kept taut by heaving in the chain as soon as the hawsers would slacken (Tr., pp. 382-3), which heaving, according to his answer to direct interrogatory 36a, was continuous during the three hours preceding the floating of the Ship (Tr., p. 388). Continuing in his answer to direct 10, where he says that the ship was floated at 11:30 P. M.: "By this time I had hauled in about 25 meters of the chain from the time the hawsers had been hauled taut" (Tr., p. 383). Passing now to I.-I. cross-interrogatory 32, which was (Tr., p. 374): "Where were you when the Celtic Chief was floated, *and how long had you been there?*" his answer was "I was then at a place 25 meters further seaward from that place where the hawsers had been hauled taut at about 6 o'clock. *I do not know how long time*" (Tr. p. 394).

So if, as he further said in answer to I.-I. cross 34, "The last pulling began * * * after the two lines had been fastened to the Celtic Chief" (Tr., p. 395), the sum total of his testimony is that the Arcona, in its heaving

from six o'clock on, on the "last pull," advanced seaward, moving the Ship at least 25 meters, or about 81 feet, either gradually from six o'clock onward, or in any event prior to 11:30 p. m.

Perhaps he meant, or his foregoing answers allow a meaning, that the moving of the Ship these 81 feet was done after 11 o'clock, as he said that he went on board the Ship at 11 o'clock (Tr., p. 396), and was on board *when she began* to move (Tr., p. 398); and that "when we had stated that the Celtic Chief was moving seaward I returned on board the Arcona as quickly as possible and ordered the anchor to be weighed. Meanwhile I got the signal * * * that she was floating" (Tr., p. 399).

Lieutenant Conneman said, answering I.-I. cross 6 (part 9 of answer): "I have personally observed that the Celtic Chief seemed to be moving *during the first heaving in of the Arcona's chain*, as far as this could be ascertained by means of bearings" (Tr., p. 425). Read this in connection with his answer to I.-I. cross 33, "The Arcona continued to tow *from 6:30 in the afternoon* (which was the beginning of the final tow) *without interruption until the floating* of the Celtic Chief" (Tr., p. 430). This testimony means the Ship moved gradually from the first heaving, beginning at 6:30 P. M.

We think the evidence of the other witnesses far overbears that of the Arcona witnesses as to the time the Ship first moved seaward, which was not until about quarter to twelve o'clock. Any movement prior

to that time was not seaward, but was more one of rolling and working and getting more lively.

To present the testimony as briefly as possible, without quotations, we think the citations given below will bear out the general statement: That the ship began to move in her bed, rolling and getting livelier along toward 11:30, and continuing this until some time shortly before quarter of twelve (Piltz, Tr., p. 2729; Dowsett, pp. 2093, 2098-9; Macaulay, 2297-8; Lewis, 3227-8); and along about quarter of twelve made her first seaward movement, which movement was very slow at first and those who had bearings and could first detect it (Dowsett, Tr., p. 2099; Macaulay, p. 2299; Henry, p. 153). Haglund, who had good bearings, theretofore, examined them when he came on board the Ship at about 11 o'clock, and states positively that up to that hour there was *no change* (Tr., p. 2917), and he first noticed her moving seaward at quarter of twelve (Tr., pp. 2917, 3040, 3045), which tallies with the time this was noticed by others: (Piltz, Tr., pp. 1781-2, 2729; Henry, pp. 152, 261; Brisco, p. 326; Tullett, p. 2671; Lewis, p. 3227). We should mention also that several of Miller's witnesses claim she *bumped* earlier in the evening (Tr., pp. 676, 1251), and Miller himself claims she moved several feet by nine o'clock (Tr., p. 1539). Having made her first seaward movement, it seemed to several of the witnesses that she came a little and stopped, with perhaps fifteen minutes' time between her two decided moves, and came again: (Kennedy, Tr., p. 764; Piltz, p. 1782;

Dowsett, pp. 2098-9; Tullett, p. 2677; Haglund, p. 3040); but gradually increased her momentum: (Kennedy, Tr., pp. 764-5; Dowsett, p. 2133; Macaulay, pp. 2290, 2292, 2298; Nelson, p. 2790); until she was off at about 12:20 (Kennedy, Tr., p. 764; Piltz, pp. 1781, 2029; Brisco, p. 327; Lewis, p. 3228; Nelson, p. 2790). Those who timed by watch say she came off at 12:20 (Tullett, Tr., pp. 2671, 2720; Haglund, p. 2918). By the engine clock Lycett said it was 12:22 (Tr. p. 2855). Macaulay gave it from his memorandum as 12:20 (Tr., p. 2289); and finally Captain Henry said he thought her first move was about 11 (Tr., p. 140), and later he saw her "making way" (Tr., p. 140), until she was afloat at 12:20, but not off the reef at 12 (Tr., pp. 126, 126-7, 153, 231-2, 232-3).

How, then, could the Arconia have been gradually moving the Ship seaward from "the first heaving of her chain," which, by the Arconia testimony, began at 6:30 that evening? And how could they have noticed her moving seaward at 11 o'clock, at which time the commander says he hurried back to his own vessel, and before he got there had the signal that she was afloat; and how was she afloat at 11:30?

In short, the case is made out, it seems to us, that the officers of the Arconia, mindful of the safety of their propellers, were timorous and gingerly in their operations. This led them to lie to their anchor, not intending to have the vessel come off that night, not intending to pull on her themselves and not wishing the Inter-Island to pull that night. They even *asked for delay*,

which was rather inconsiderate of the Vessel, at that time of year, it being inconsiderate in any case to let a ship lie stranded one day or hour longer than is necessary to get her off. They wanted daylight for their operations. Being told by Captain Haglund, however, that the Inter-Island would not let the midnight tide pass, signals were arranged for the benefit of the Arcona, to give her notice when the Ship moved. Again, the truth is that they still intended to make no pull themselves that night, and relied upon their judgment that the "little tugs" could not move her, and were therefore taken unawares; and the carefully arranged signals (which might even have been more elaborate) which would have taken some time to send off intelligibly, were shot off in a bunch, green lights and all (Tr., pp. 2083-5, 2916, 3154; Lowry, p. 314), so great was the need of getting the last one—the Ship is afloat. They were simply unprepared—ignorant of the fact that for half an hour at least before the ship came off she was beginning her seaward movement, for, had they known it, the first of the signals would have been given about half an hour before the Ship was off; and, had they known it, one or the other of the cruiser's officers would have been able in that half hour to have returned on board and been there to give orders to move in some way. As it was, the commander *ran* to get off the Ship (Haglund, p. 3062), so he must have learned rather suddenly that she was moving. As no ship moves without the officer in charge being on board,

and as, as a matter of fact, the commander didn't have time, on his own testimony, to get back to his ship from the time he learned the Ship was moving until she was off, it is clear that the Arcona stayed in her position because *waiting for her commander*.

When he got on board—*then* the Arcona moved.

What their signals were to be may be gathered from the following references: (Tr., pp. 609, 647, 670-1, 2319, 2571-2, 2913-17; Henry, pp. 217, 249-50; Brisco, pp. 327-8). The manner in which they were actually given may be concluded from the following further references: (Tr. pp. 609, 648, 671, 692, 767; 823, 898, 1038-9, 1237, 1272-3, 1293, 2321, 2571-2, 2551-3, 3154; Henry, p. 140, 217-18; Lowry, pp. 312-13, 315-16; Brisco, pp. 327-8, 340, 352).

If the Arcona officers were in good faith expecting to pull on the Ship that night, one of them should have remained on board. A vessel dares not move without someone in command on board.

Reaching, then, the time of the floating of the Ship, we find further evidence of hindrance by the cruiser. Both Macaulay and Haglund had to urge her to steam ahead and get out of the way that night (Tr., pp. 2916, 2528-30, 2535). Her screw hit Miller's anchor buoy (Tr., p. 1695), and her wire probably fouled the buoy and tore it off (Tr., pp. 599, 687).

There was a good deal of justice in Miller's bitter denunciation of the Arcona—her "opera bouffe," as he called it (Tr. p. 1364).

The best way to get a ship off is usually the way she got on (Haglund, Tr., p. 3146).

The Arcona's officers say they towed the Ship to a "place of safety" (Henry, Tr., p. 141). Conneman says they handed the Ship over (Tr., p. 431), to which Schroeder adds "near the entrance of the harbor" (Tr., p. 383). Macaulay says they left her in the open sea (Tr., p. 2324), despite his protests against the cruiser casting the Ship off at that place when her arrangement had been to take the Ship to a safe anchorage.

Her towing of the Ship to sea was badly done, because no ship can tow with two lines (Tr., p. 1660).

Also, the Arcona's lines entered the *midship* chocks on either side (Tr., p. 1785). During the afternoon the line on the port side, being over and resting upon the Mikahala's line, was parcelled to the Mikahala line where the latter entered the starboard quarter of the Ship (Tr., pp. 1785, 2666, 2922). When the Arcona began to race seaward, one line (on the port side of the Ship) broke or was cast off, and she was dragged *quartering*, and necessarily moving more or less like an unbalanced kite would do, until the tricing (or splicing) broke at the port quarter, whereupon the line naturally began to pull amidships. The result will have to be imagined, because the court reporter has made a sad mess of Haglund's answer on page 2922. Enough appears, however, to indicate that the witness said, in effect, that when the tricing line parted something happened. It (the towing line) swung out so that the broadside pulling, at the point amidships,

canted the Ship, and by the violence it was thought "the whole mizzen-top was coming down."

For further references as to how the Arcona towed the Ship, after she was floated, see Tr., pp. 482-3, 769, 1365, 1658-60, 1660, 2322, 2323-26, 2292-3, 2677.

Captain Schroeder says he got the Ship off at 11:30 and that at 1:30 "one of the tugs took over the Ship" (Tr., p. 383). Accepting his *own time*, he was *two hours* getting that Ship to a "place of safety" after she was off.

For many other references throughout the testimony, indicating lack of good seamanship on the part of the Arcona, see Tr., pp. 777-8, 778-9, 939-42, 960-1, 1365-6, 1659-60, 1678, 1785, 1789-90, 1805-7, 1849-50, 1929-31, 1949-50, 1952, 2429-30, 2507-8, 2534-39, 2671-2, 2900-1, 2962-4, 2108-10.

Taking the evidence as a whole, the bare fact stands out that the Arcona spent from noon until six or seven o'clock in "maneuvering" before she was able to get lines connected with the Ship which were not afterwards broken, but which, even then, certainly *would have broken had she tried to pull* on them. They were no stronger than before.

Looking at the time consumed by the Arcona, it does not compare favorably with the manner in which the Helene went to work. The Helene arrived on the scene about seven o'clock on Tuesday morning and dropped *two* anchors, rigged a bridle and had everything taut and ready for pulling and began pulling before eight o'clock—less than an hour, and was a

useful factor continually (Tr., pp. 3023, 2272). The Mikahala came out on Tuesday morning, dropped her anchor, ran a line and equipped a bridle and was ready for towing and began towing within *fifteen minutes* (Tr., p. 1764).

One witness said the Arcona was "maneuvering around all afternoon" (Tr., p. 1694).

We should, however, give the Arcona credit for her searchlight; it helped the others a little.

It is claimed that her commander advised lightening the Ship and putting out a stern anchor. As to lightering, this was already under way, and when Captain Henry found that Miller had stopped, it was continued by the Inter-Island. As to putting out an anchor, the advice was hardly necessary. He offered further advice, namely that a line be run from the bow to the Ship to slew her around, and get her off that way—advice which was rejected by all the others as being most unseamanlike and certain to increase the danger of the Ship (Tr., pp. 2328, 2925).

OPERATIONS OF THE MILLER SALVAGE COMPANY.

Until the trial of these cases we were not ourselves aware of the really small part the Miller Salvage Company took in the real salvage operations.

It is true that the lightering done by him was ultimately of considerable advantage to the vessel, he having taken out 246 long tons of the cargo (Watkins, Tr., p. 1201) which served to decrease her floating draft

by 8½ inches (see Tr., p. 2296); but there is a question how much *better* her situation might have been if he had not tied his vessels to the stranded Ship, which by his own admission increased the drag shoreward on the Ship because she had to take the brunt of the swells not only against her own stern but against these barges hanging on to her (Tr., p. 1548, and see Henry, Tr., pp. 258-9), and, we think, so far as the Ship did continue to go further toward shore, this was a largely contributing cause (Tr., p. 1550). Taking it from another point of view, it may have been that but for the added resistance of these clinging barges, the Mauna Kea and Intrepid might have gotten the vessel off with the advantage of the lightering under proper conditions. Although he said he could not have anchored his vessels alongside (Tr., pp. 1443-45), we think he could have done it as well as the Inter-Island Company anchored their donkey barge (Tr., p. 2008).

It is also true that Miller's lightering operations involved more difficulty than ordinarily attends such work, and perhaps some danger to his barges, on account of their heaving and surging in the swell alongside the Ship. But, aside from this, the work was done in an ordinary way, in stevedore fashion, by stevedores working hard and working overtime to be sure, but hired at specified rates, and incurring no danger to themselves. In Miller's own words, his removal of cargo was under nothing more or less than a *lightering contract* (Tr., p. 1667), entered into by him with Captain Henry against his own advice and wishes, he dis-

claiming responsibility for what might happen to the Ship by lightering without first putting out a stern anchor to hold her (See Tr., pp. 1351-2, 1548-9, 1614, 1623-4, 1681-2). In other words, Miller's lightering work was on a contract and not on a salvage basis, and he so regarded them himself.

Nor is it to be denied that Miller's anchor, placed astern, contributed in some measure to enabling the Ship to make her initial move from the reef; but it is submitted that an analysis of the situation will show that in any case his outfit was really a comparatively small factor in the power applied, and that it became wholly useless in any event as soon as the Ship had given ground at the first motion. Although the Ship afterwards stopped again, having stirred a little, Miller's power was not again brought to bear. We are satisfied that the trial Judge accorded too much credit to Miller's part in the work.

It cannot be said that Miller conducted his operations scientifically. Had he been left to his own devices he would have left his anchor where he dropped it the first time on Tuesday evening off the port quarter of the Ship (Tr., p. 2237).

Miller says he advised Capt. Henry to lighten the Ship, and also said he had an anchor which he advised be put out astern at once, (Miller, Tr., p. 1351; Henry, Tr., p. 132), which advice he says was not taken. Henry says he *did* ask Miller, at 8 o'clock Monday morning, to bring out his anchor (Tr., pp. 248-9). Miller, however, instead of using one of his vessels to bring out

the anchor, used them all for lightering, when he might and should have brought the anchor out on the first trip of the Makee when the Makee was actually under steam, instead of loading the Makee with fertilizer. He finally did get the anchor aboard the Makee late Tuesday afternoon (Tr., p. 1353), and was then delayed by the inspector forbidding use of the Makee's engines, because of his failure to keep the engine up to regulations. In consequence the Makee had to be towed out by the Mokolii (Tr., p. 1585). The Makee in tow of the Mokolii arrived at the Ship with the anchor about dark on Tuesday night (Tr., pp. 1605, 1631, 2926), and by the weight of the evidence Miller took the Makee to a point off the port quarter of the Ship and there dropped the anchor in shallower water than where the Ship lay (Macaulay, Tr., pp. 2237-41; Haglund, Tr., pp. 2926-7, 3144-6; Miller, Tr., p. 1577), and sent a surf line by the Mokolii over to the Ship, expecting to have it taken on board and made fast, for which purpose Capt. Scott of the Mokolii threw a heaving line on board. Upon Capt. Macaulay's advice, however, the line was not made fast but was thrown overboard again because the anchor was in a very bad position for pulling on the Ship, as it would have tended to make her go broadside, and inclined her towards shallow water besides (Tr., pp. 2238, 2927, 3145-6, 2234, 2260-1, 2637-9).

Angered because of the rejection of his line, Miller had a stormy interview with Capt. Henry in the morning, in which he says that he threatened to take his

whole outfit ashore and leave the Ship to her fate, besides which he would see that Capt. Henry had his license cancelled (Tr., pp. 1355, 1624, 1640). Miller was told that if he would take up his anchor and place it where directed astern of the Ship his line would be received, and he met this condition and moved his anchor (Tr., pp. 2238-9, 2928).

By the testimony of his own witnesses the rigging of Miller's blocks and tackles, and working of them to get the slack taken out of his anchor line, covered practically the whole afternoon, and it was not until late afternoon or along toward evening that he finally got his line fairly taut (Tr., pp. 1032, 1250, 1330, 279, 296).

Without going into the quotations of evidence pro and con, as to whether or not the Miller line thereafter continued taut or not taut, we think the testimony as a whole shows that Miller did for a part of the time get a fair strain on his anchor; but we maintain that, as he was using new lines in his tackles, a good part of the capstan work, until late in the evening, merely went to take the stretch out of the ropes. He did have some strain. We think Capt. Macaulay favored him a great deal in saying he had a powerful strain. But Miller's strain was in operation at best only until the Ship first began to move, and to some extent was an *aid* in *starting* the Ship. After the Ship once moved Miller's line was thereby slackened and he was unable to shift his tackles in time to get another strain upon his line. This will appear by a brief reference to the manner in which

Miller's tackle was rigged. He had three pairs of blocks, the first two having three sheaves in each block, and the third pair having two sheaves. It follows indisputably, as is explained in detail by Capt. Haglund (Tr., p. 3136-8), that in order to move the main block where shackled to his anchor line, a distance of one foot, or in other words, in order to bring the pair of blocks on the main tackle one foot nearer together, it was necessary to take in 144 feet of rope on the third set of blocks. It follows that if the block on the main tackle attached to the Miller line were to move say 5 feet in a minute (or any other given space of time), the 144 feet necessary to be taken in to *do that* would have to be taken in during the *same interval* of time, i. e., it must travel 144 times faster than the main block on the line. In other words, if the Ship, once started, moved even as slowly or as much as 2 feet a minute, Miller had to get in 288 feet of line in that same minute,—*just to keep even*. And no capstan could be turned fast enough to do that, and Miller had his line *to the capstan* when the Ship started, for he didn't use the winch after nine o'clock (Tr., pp. 1663-4). Therefore he was unable to take up or keep pace with the slack. And besides, as the distance from the foremast to the after block of the second luff tackle was not over 120 feet, the second luff tackle would have had to be fleeted at the rate of a little more than once for every foot that the main block would move. Fleeting the tackle was no easy matter with the heavy lines, and it took time. The evidence as a whole really shows, we

think, that when the Ship had started and made her first move or jump, coming half her length or less, and then stopped, *that* was the time Miller's tackles "dropped" the first time, and, the Ship having made this first move and stopped again for perhaps 15 minutes, Miller was able to take in the slack, fleet his tackles, and turn the capstan again. But it is in evidence that his hawser and wire were shackled together with a large iron shackle (Tr., pp. 2625-9), at a point, after his line was first fairly taut, 30 or 40 or even 60 feet astern of the Ship (Tr., pp. 2287-8, 2241-2, 2434). The movement of the Ship so far slackened his line that when he hauled in on his line during the temporary stay of the Ship, it came in freely until the shackle reached the outside of the chock at the stern of the Ship, and being too large for the chock, stuck there (Tr., pp. 2288, 2629, 238). It followed that Miller was able to get a very powerful strain on his outfit between the *chock* and the *foremast*. Doubtless the appearance of his tackles when this occurred has furnished the ground for many of the assertions of his witnesses that he had a big strain on the anchor,—because the *tackles* were tight. Capt. Macaulay says he *did* have a big strain then,—but it was on the *chock* (Tr., pp. 2291, 2435-6, 2629; and see Henry, Tr., p. 238). Upon Capt. Macaulay discovering the shackle stuck in the chock a capstan bar was used by him to pry it through, and this done, the shackle leaped through (Tr., pp. 2291, 2436), allowing all of Miller's tackles to drop to the *deck*, and there was the *second* "drop" of Miller's tackles to

the deck. Henry says, too, that Miller's *wire* didn't come on board (Tr., p. 236), until after 12 o'clock (Tr., p. 238). Then it came with a rush when the shackle was helped through the chock. By that time the Ship was practically afloat, or in any case coming off so rapidly that it was out of the question for Miller to attempt anything but get his shackle off and cast his line off the Ship (Tr., pp. 2436, 2630).

But even as to the time when he did have some kind of a strain on the anchor line, which probably helped the Ship make its first movement, we submit that the strain was rather inconsiderable because of the limitations on his power.

In the first place he was using new lines which were large and stiff (Tr., pp. 959, 1151), and which, even when made smaller and more flexible by stretching, nevertheless required a considerable amount of power merely to run them through the blocks. The boy who has gone to his father's barn and tried to haul apart the ordinary two-sheave blocks of the hay-mow tackle, lying along the barn floor without a weight, knows it requires considerable power to do so, even if with the small ropes. On this Ship, it took several husky stevedores to drag the blocks and fleet the second luff tackle expeditiously, some of whom would be hauling the block aft and others hauling on the lines to assist them through the sheaves (Tr., pp. 1153, 1337). If that much power was required for an operation amounting only to running the loose ropes through the pair of two-sheave blocks, it would doubtless have taken *more*

power to fleet the first luff (or middle) tackle, which were three-sheave blocks, and as much or more again to move the ropes through the main tackle blocks, also three-sheave (Tr., p. 893). All this is aside from any exertion of *strain* on the anchor line itself, for we are speaking here of the mere power used up in overcoming the friction of the blocks and ropes themselves. Say that it would take a dozen men to overcome the resistance of the entire tackle equipment. The power which Miller had to operate his tackles was ordinarily the Ship's capstan or the Ship's winch. It is in evidence that he used the Ship's winch in preference to the capstan every time he could, which was at intervals when it was not in use for working cargo (Tr., pp. 1603, 1662). No logical conclusion can be drawn from this, taking the testimony on the point as a whole, except that Miller considered the Ship's winch furnished more power and was more rapid than the capstan. In the forepart of this brief, under the head of Lightering Operations by the Inter-Island Company, we have particularly indicated the extreme weakness of this winch, it being unable to lift over one-half a ton. It would appear to us that the power of the winch would, therefore, come very nearly being used up in overcoming the friction in the tackles alone, leaving comparatively little to be transmitted in useful strain to the anchor line.

As to the strength of Miller's anchor line: although he had a $2\frac{1}{2}$ -inch wire, it fell short of reaching the Ship, and was lengthened by an 8-inch (Tr., p. 2242),

or 10-inch (Tr., p. 2997), Manila hawser (Tr., p. 2246), a connection being made by a shackle of the kind drawn by Capt. Macaulay on one corner of Exhibit F (Tr., p. 2433). Now the weakest point in Miller's line wasn't his Manila hawser; it was his small $\frac{3}{4}$ -inch wire which he claims was used to reinforce the manila, and he considers it added the strength of *two* $\frac{3}{4}$ -inch wires because it was run double. The breaking strain of a single $\frac{3}{4}$ -inch wire is 12.3 tons (Tr., p. 2998). But it cannot be said that there was the strength of two wires in operation, because one end of the wire was taken from the Ship out to the shackle and there run through the eye of the shackle, and the end then hauled back on board by a line, causing the wire to run through the eye of the shackle until the first end was back on board, whereupon both ends of the wire were made fast on board (Tr., pp. 2288, 2998), the whole operation amounting to threading the eye of the shackle with the wire (Henry, pp. 236-8). Captains Haglund and Macaulay say that the real purpose of the wire was to serve as a "preventer" to hold the wire cable from slipping off into the sea in case the manila should break. Under these conditions the Miller line was no stronger than its weak part, the one thickness at the shackle.

As to the Miller anchor, although it has generally been referred to as weighing 7 tons, Miller really did not know (Tr., p. 1667); and in the bill of sale of the anchor to Miller it is rated as a "10,000 lb." anchor (Tr., pp. 3344, 1667-8, 1533), or 5 tons.

For a comparison of the holding powers of the Miller anchor as against the anchors of the Helene, as an aid to the vessel, we refer to our presentation of Capt. Haglund's evidence in the forepart of this brief. Possibly, if the Miller anchor wire were heavy enough or slack enough to lie flat upon and run along the bottom of the sea for some distance from the anchor before rising toward the stern of the Ship, the matter of comparison of angles between the Miller and Helene anchors would become of less importance than the comparative weights. We have already in this brief (page 84), shown that the total weight of the Helene anchors and anchor chains was 11.6 tons. Miller's wire could not have weighed anything near as much as the Helene's anchor chain per fathom, but even allowing them to have been *equal* weight per fathom (but it would really not be half), he had out 636 feet of wire plus 40 feet of Manila, equal to about one-third of the total length of chains forward of the Helene. One-third of the weight of the Helene's anchor chains would be about 6,200 pounds,—say 3.1 tons, added to a *5-ton* anchor would make 8.1 tons, 3.5 tons less than the Helene's anchor and chain weight. The Helene had, besides, the effective or useful thrust of her propellers, which was 3.11 tons (tied), and also her 45 horse-power steam winch used in heaving on her anchor chains; and even yet there was the additional strain on the Helene's line imparted by her moving in the swell, and practically adding her weight to her pull.

Therefore, as a salving factor, Miller's outfit was far inferior to that of the Helene alone. And in addition to the mere limitations upon the power of his outfit, he didn't bring it up even to those limitations. His lines were not as taut as they *could* have been made; in fact it was far from being taut. Piltz frequently stepped over them (Tr., pp. 1799-1802, 2732-5) at a point where they should have been at least four feet or more above the main deck by any scale drawing of the situation. See Tr., pp. 2042-4, 2073-77, 2496. His lines were *not* held down by the Arcona line, because the Arcona line passed *under* (Tr., pp. 2733, 3153). Ordinarily his line was not tight. It went down into the water 30 or 40 feet from the stern (Tr. p. 2683) from the time it got dark and while the searchlight was on (Tr., p. 2683).

His best strain that night was on the chock at a time when even the weight of his anchor line was taken off his tackles.

The photograph, Exhibit L, shows Miller's line in the only position Tullett ever saw it in (Tr., pp. 2700-2).

With respect to the value of the vessels and equipment of the Miller Salvage Company in its operations at the Ship as a factor bearing upon any salvage award that may be given the Miller Salvage Company, we think the evidence speaks largely for itself; but we will suggest to the Court that the Mokolii was 30 years old, and cost Miller \$350 (Tr. pp. 1488-9); that the

Kaimiloa was 65 or 70 years old (Tr., p. 1488); that the Concord was 28 or 30 years old (Tr., p. 1488) and cost Miller \$850 (Tr., p. 1490); that his windlass cost him \$105 (Tr., pp. 3314, 3319), and his anchor cost him \$650 (Tr., p. 1532). A comparison of the values placed by Miller upon his vessels and equipment (see Tr., pp. 1417-24, 1491-2, etc.) with his tax returns will be interesting (see Tr., pp. 1485-6, 1492-3).

It appears that Miller had a surplusage of men at the Ship—at times, at least. In one place in the testimony it is said that he couldn't use a number of them, but they had to remain on the Ship because there was no way to send them ashore (Tr., pp. 619-21).

No assistance from the Ship:

Weight should be given to the fact that the work of salving the Ship was done with *no assistance from the Ship*. We may gather from the testimony here and there that Captain Henry gave orders occasionally, but it appears that he leaned pretty well on Captain Macaulay's advice in coming to decisions of what ought to be done. Aside from this it does not seem that the salvors had any aid from the officers or crew of the Ship. Had the captain of the Ship been cautious in his approach on Sunday evening or manifested ordinary sagacity with his vessel it is extremely unlikely that his ship would have been stranded.

From the testimony of Captain Macaulay, a pilot who knew every variation, tendency and caprice of the sea and elements in the vicinity of Honolulu harbor,

his very first word to the Ship was one of warning that the Ship was too close in (Tr., p. 2176), and his next thought was to get her out of it, for which purpose he advised taking in sail immediately and otherwise maneuvering the vessel to get her away from her proximity to the reef, and when this advice was not acted on, and getting away was apparently out of the question, he endeavored to have her anchored quickly. But in none of these things did he receive encouragement or co-operation.

In the first place, Captain Henry was a total stranger to Hawaiian waters (Henry, Tr., p. 151), but came boldly up and afterwards as a witness claimed that he was sufficiently acquainted with the conditions as he had his charts (Henry, Tr., p. 151) and his "book of directions" (Tr., p. 151). When Macaulay advised wearing the Ship to get her out, Henry though he knew his Ship better than Macaulay—there would be "no trouble at all" in taking in his sails and bringing his ship to anchor (Tr., p. 2177). Macaulay advised or ordered the jibs down, "but they were not hauled down" (Tr., p. 2178). He ordered the starboard anchor let go; "It wasn't let go" (Tr., p. 2178), with no explanation why not until after the third hail and declaration of the consequences imminent, when the explanation was that the starboard anchor was jammed (Tr., p. 2179). They didn't use their own sense to think they had more than one anchor. They didn't take down the fore topsail until too late (Tr., p. 2179). By Henry's own tes-

timony he still had six topsails set when the Ship first struck the reef (Tr., pp. 163-4). He said further that he took these in within a quarter of an hour afterwards (Tr., p. 164), but McAllister says that when he came up on Monday morning her square sails were set (McAllister, Tr., pp. 98-99). Henry would have taken Miller's line from the first position of the anchor had Macaulay not advised against it (Tr., p. 2232). On board the Ship, besides the captain, was a crew of 25 men and the officers (Henry, Tr., p. 148), but there is little evidence of their assisting anywhere. On the last night Captain Haglund didn't see Henry in evidence at any particular time (Tr., p. 3045). Lonche said of Henry, "he was most of the time down below. His *mate* did more than anybody else" (Tr., p. 490). Lowry was *mate*, and on that night *he* went down to sleep at 10 o'clock and slept until 11:30 (Lowry, Tr., pp. 274-5), when he came on deck and immediately went forward (Tr., p. 315), without even looking around to see any lines or know what was the condition of things, and from 11:30 on he remained on the forecastle (Tr., pp. 274-5). Brisco was second officer. He didn't overlook his "tea", after which he "knocked around the deck" * * * walking around watching them discharge" (Brisco Tr., p. 332). Sorenson, the Ship's carpenter, quit working at six that evening (Tr., p. 356). Neither did Gordon work after six (Tr., p. 359), and he was underneath the break of the poop from eleven o'clock until the Ship came off (Tr., p. 359). The two apprentices were "having a sleep"

(Brisco, p. 338). Nowhere does it appear where the Ship's crew were. They haven't been referred to even as spectators. In short, the whole credit of the salving belongs to the salvors—none to the Ship.

Success:

The Ship and Cargo Were Saved Without Material Injury.

Aside from some "deck damage," consisting of poop rails and wharfing chock broken, and a big dent in the mizzen mast (Henry, Tr., pp. 144-5), and some boat davits bent (Tr., p. 145), and a very slight damage to the ship's bottom in the way of dented plates (Tr. p. 145), the Ship sustained no injury, and after repair of her mizzen mast was able to leave port.

The only damage to the cargo was from some of the fertilizer bags being broken and some of the contents lost on the deck by being wet and some reduced in value by a little of the several kinds being mixed by breaking of bags (Henry, Tr., p. 145; Watkins, p. 1202). The claim for damage to cargo was appraised at \$1,441. (Watkins, Tr., p. 1204).

As between the various agencies having part in the operations at the Celtic Chief, the inquiry of this Court will be to find, upon all of the evidence in the case, which of the several agencies were really responsible for the salvage of the Ship, and in what relative proportions.

When it is found that one witness, connected with or in the employ of one of the salving agencies, says one

thing, and is contradicted by another in the employ of another of the agencies, or by the interested officers of the Ship; and when we look for a witness who had no connection with or interest in any one of the salving agencies against the others, the search will narrow down to but one, Captain J. R. Macaulay, who is at the same time better qualified, perhaps, than any other witness who could be found, to give opinions in matters of sea knowledge, sea experience, salving, and who has a thorough knowledge of all the conditions and elements to which any reference has been made in the trial of this case. Of Captain Macaulay's qualifications, it appears in this case: That his age was then 57 years; that he has been a Honolulu Government pilot for eighteen and one-half years; that he has had forty-two years experience at sea; that he has been a master of both steam and sail for twenty-seven years (Tr., p. 2166); that he has had considerable salvage experience (Tr., pp. 2167, 2168-9, 2169-71), and the Chiusa Maru was ashore on this very same reef; that he is familiar with lines, cables and tensile strengths (Tr., pp. 2171-2), and ground tackles (Tr., p. 2173); that he is acting agent and surveyor-general of the American Bureau of Shipping, New York, and also acting for the Bureau Veritas, Paris; and holds diplomas from both of these bureaus (Tr., p. 2208).

For an unprejudiced opinion, apart from possible jealousies, we think the Court may safely turn to the testimony of Captain Macaulay, who "had a thought to every little move" which might assist the Ship (Tr., pp. 2259-60), and who was a constant observer of the

operations from first to last, and knew also the conditions before any assistance arrived, and whose whole attention during the operations was continuously given to getting the *most* out of every form or possibility of assistance which are presented or could be devised, even to assenting to and approving the displacement of one salvor in the hope (which proved a vain one) that the substitution of a larger vessel would help the ship more materially. Differences in testimony of other witnesses on any given point may well be settled by reference to what Macaulay has said concerning it. We think that his opinion, expressed on page 2622 of the testimony, is comprehensive, fair to all, and may be accepted with confidence by the Court. We here quote it in full:

“To the best of my knowledge and belief, I consider that the salving of the Celtic Chief was due to the assistance rendered her by the Inter-Island Steam Navigation Company in lightering the cargo and in towing the ship, also partly due to the tug Intrepid and Young Brothers’ gasoline launch in holding the ship in position until such time as the Inter-Island Steam Navigation Company took hold, and I also believe that the salvage of the Celtic Chief was partly due to the Miller Salvage Company, whereby they lightered and laid a sea anchor with a powerful purchase and gave material aid in floating the vessel, and I will also state that I believe by a rise in tide that the rise in tide greatly helped the floating of the Celtic Chief, and all those combined were, to the

best of my knowledge and belief, the cause directly to the rescue of the vessel and cargo."

Captain Haglund, unquestionably next in experience in the Island waters, and doubtless *most* experienced in matters relating particularly to inter-island steamship work, follows with his opinion, which, as he could not speak of his own knowledge concerning the Intrepid, was confined to the closer question of what took the Ship off the reef. He said:

"To the power that was exerted by the Inter-Island Steamship Company's steamers, the lightering of the cargo out of the Ship by the Miller Salvage Company, as well as the Inter-Island Steamship Company, and the amount of strain, whatever that would be, that was put on the Miller anchor. It was an additional help." (Tr., p. 3014.)

As to the proportion of aid rendered by the Miller anchor, he said further: "It would not be more than any of the Inter-Island steamers individually were exerting on the Celtic Chief." (Tr., p. 3015.) And of the Likelike, the smallest of the Inter-Island steamers, he said she had a "bigger strain on her than they exerted on the Miller Salvage Company's line." (Tr., p. 3157.)

CREDIBILITY OF WITNESSES.

On account of the fact that credibility of witnesses is often an important phase for consideration on an appeal from findings of fact by the trial court, we trust that a slight extension of our brief, already too

long, will perhaps be of value to the Court on the subject.

Captain Schroeder.

We cannot avoid noting the vague generalities in the testimony of this witness; and the frequent inaccuracy of many of these, besides positive error in others. Details have rarely been given by him, and it seems to us that in most instances where he has been forced by the cross-examination to give details as to how or why he knew of some point, his previous testimony has not been sustained by evidence of his own knowledge, or it has appeared that he had drawn a conclusion, which he had assumed to state as though a fact known to him. This once apparent, the suspicion of unreliability attaches to his whole testimony, and this is not removed merely because on some points he is correct. That some of his errors are on inconsequential points should make no difference. Too often he has made unqualified statements of things as *facts*, when it is clear he had himself merely drawn a mistaken conclusion. For example:

We know, as a fact, that the anchor and line put out astern of the Ship was the work of the Miller Salvage Company. But Captain Schroeder, having in mind that he had advised Captain Henry to put out an anchor astern, and later seeing work of that kind going on, *assumed* and said, with no qualification or uncertainty of any kind, that "*the ship's crew* was engaged in connecting the ship with a weight or anchor

lying behind the stern of the Ship." (Tr., p. 385.) He apparently had no suspicion that the Miller Salvage Company was represented there at all, as, in answer to Direct 33 as to what other agencies than the Arconia were attempting to render assistance (from first to last of the operations), his answer was, "There were three little steamers" (Tr., p. 388). See also Tr., p. 395.

Twice he gave the hour of floating of the Celtic Chief as 11:30 o'clock that night (Tr., pp. 383, 399). Clearly he was mistaken as to the time, by the overwhelming weight of the other testimony.

Asked what advice, if any, he offered the Ship, he said that he gave the advice to lighten the Ship and put out an anchor (Tr., pp. 385, 391), and he failed altogether to mention that he also offered advice which was rejected as absurd and perilous to the Ship—that a line should be run to the Ship's bow and the Ship slewed around broadside as a means of getting her off. (See Haglund, Tr., p. 2925; Macaulay, p. 2328).

Again, we doubt very much whether Captain Henry ever told him that the Ship's floating draft was 24 feet aft and 20 feet forward (See Direct 11 (Tr., p. 384) and I. I. S. N. Cross 9 (Tr., p. 391),) because Captain Henry himself testified positively to her draft as being 21 feet aft and 20 feet 10 inches forward, which fact he knew when he left Hamburg (Tr., p. 251).

Again: his answers to direct interrogatories 10 (Tr., pp. 382-3), 24 (Tr., p. 386) and 27 (Tr., p. 387), gloss over with remarkable indifference the real facts of how

those operations were conducted, and what they attempted and failed in, and how they spent all the time from 12 o'clock until six or later in merely trying to get lines *connected in position for* pulling. We have nothing from Captain Schroeder of his anchor being first badly placed, or of the manila rope breaking, or the Arcona drifting too close to the Helene, or of the several hours spent that afternoon in a futile attempt to run a large wire on board.

Lieutenant Conneman:

The witness' testimony is equally devoid of the particulars as to the afternoon's endeavors on the part of the Arcona, and how they occupied the time *between* the times when the lines were "fast" (Tr., pp. 419-422);—although he was asked to tell *what was done*.

Captain Henry:

Captain Henry's testimony, taken as a whole, shows a very pronounced leaning toward a choosing of the least favorable times to tell of the work of the Inter-Island Company, and the most favorable when it comes to Arcona operations. Nowhere is there any concession of merit or appreciation of anything except as to the Arcona. The record abounds with indicia of his prejudice and efforts to belittle every effort that might mean cost for salvage. He characterized the service of the Likelike in taking the Ship after being arbitrarily cast off by the Arcona, far at sea in the dead of night, as "usual towage" service. (Tr., p. 142.)

He says he "tested" the various lines,—although he could not have tested the lines of the Mikahala or Like-

like. He did not "test" any of the *Arcona lines*. (Tr., p. 258.)

He could not testify positively about the bights in the Arcona lines (Tr., p. 245), but nevertheless said the lines were straight out of the water.

He failed to tell about the Arcona's *failures* when he was testifying on pages 186-9.

He said what he knew was untrue—or should have known it—that the Ship did not move farther on the reef (Tr., pp. 135, 165, 226).

He pretended he knew all that was necessary to know of these waters, having a chart and a book of directions (Tr., p. 151).

When he didn't want to answer he would frequently resort to the phrase "I cannot say" (Tr., pp. 157, 181, 182, 183, 188, 194, 192).

Clear evasion is shown on pages 162-3, 174-5, 180-3, 186, 186, 194, 194, 195.

He didn't want to draw a diagram (Tr., p. 174).

He was not frank: when he said that "at times" there was no swell at all (Tr., p. 163). This is as true of the facts as to say that at times there were no waves—because *between* waves or swells there are none at all.

He was not frank: when he said that he saw the whole length of both Arcona lines (Tr., pp. 186, 218), when the inquiry was as to their condition *as lines*. Nor when he said he didn't know why the Ship bumped (Tr., p. 227), nor in his answers on pages 204-5 regarding bumping; nor when he evaded telling the distance between the Arcona and the Ship (Tr., pp. 193-5);

nor when he told only a small part of the truth of how the Arcona went far to sea with the Ship (Tr., p. 199), and why the Arcona would not tow the Ship back to anchorage (Tr., p. 199).

He was strangely averse to assisting in any exhibition of his Ship's papers (Tr., p. 299)—not that he had anything to conceal, but as showing his frame of mind as respects the other side of the suit.

He was not frank, when he claimed that they did use two falls on the Ship's winch (Tr., pp. 157, 159). They did, but only one at a time. He was not frank in telling of the Arcona and Intrepid (Tr., pp. 181-3, 163).

Captain Macaulay:

Aside from the question of the qualifications of this witness, already referred to, Capt. Macaulay was not disposed to give opinions and pass judgment on matters concerning which he lacked information or felt incompetent. He would not assume to tell how long it would have taken the Ship to have gone broadside but for assistance (Tr., pp. 2211-12, 2215).

Capt. Henry had such faith in Capt. Macaulay that he followed his suggestions, and did it even blindly in the case of the Miller line thrown over the rail on Tuesday night. Henry threw it overboard and learned why afterwards (Tr., pp. 2234-6). He would not state the size of the shackle on Miller's line (Tr., pp. 2434, 2626-9).

Counsel may argue that he was wrong in some matters in point of *time*. His uncertainty in matters of

time was repeatedly expressed by him (Tr., pp. 2230, 2238, 2300, 2327, 2504-5).

He would not be sure of the *Helene*'s second anchor (Tr., pp. 2228-9).

If it be argued that Macaulay erred in having taken up the Ship's anchor Sunday night (Tr., pp. 2363-4), the answer is that a breeze came up that offered to get the Ship off from where she was only lightly touching and not *on*.

If it be claimed that he should have sent a boat ashore that night for assistance (Tr., pp. 2362-8, 2371), the answer is sufficient that they burned blue lights, before an open view of the town, and it was most singular that they were not noticed. Anyone would have been justified in thinking that action sufficient to bring help as soon as it could be reported.

Capt. Macaulay was well regarded as a witness in the *Chiusa Maru* case (3 U. S. Dist. Ct. Rep., p. 368).

Dick Clarke:

Not to be relied upon. See his testimony that he saw the *Mauna Kea* break her line: first on Wednesday when he was rigging the Miller tackle (Tr., pp. 1072-3)—(which was rigged on Wednesday); then it was Monday (when no Miller tackle was rigged); then it was Wednesday (when the *Mauna Kea* wasn't there). See pages 1072-9, 1135, 1137-8.

Haglund:

Age 57; grew up at sea; salvage experience (Tr., pp. 2886-8): Gave close attention to all the lines; a hard man to keep the run of that night (Tr., p. 2513).

Piltz:

Considering the fact that this man is a South Sea Islander and had no education (Tr., p. 2055); didn't know the word "physics" (Tr., pp. 2055-6); "not a college graduate" (Tr., p. 1849); was aged only 29 years (Tr., p. 1758) and yet held master's papers for sail at $25\frac{1}{2}$ years and for steam at 27 years (Tr., p. 1758); and has had ten years' experience in Hawaiian waters (Tr., p. 1759) and some salvage experience (Tr., p. 1759), and that he declined to testify about things he wasn't sure of (Tr., pp. 1795, 2030-1, 2043-4, 2069, 2076-7),—we submit that his patience under the constant efforts to confuse him and entangle his statements, and his modesty as to his position in the operations (Tr., p. 2070),—not *in charge*, like nearly every Miller witness,—show him a witness entitled to very great credit.

Miller: Enough has been said.

AMOUNT OF AWARD.

The evidence on many of the issues of fact was conflicting, and while it is the province of this Court to re-examine the evidence throughout, it is submitted that the findings of fact by the trial judge are entitled to very great weight. We have thus far presented the case upon the facts, and submit that the findings of the trial court are in the main well sustained by the evidence.

Discussing, then, the amount of the aggregate award, we wish to point first to the fact that fully three and one-half years have elapsed since the salving, and that

interest for this period has been taken into consideration by the trial judge and is covered by the award at the rate of 6%, it being specifically indicated that this interest covers the difference between 17½% (correctly 18½%) of the value of the property salved and \$30,000, i. e., \$5,220. As 18½% of the salved value (\$134,599) amounts to \$24,860, we have thus the *real salvage award* as at the time of the salving.

It is submitted that 18½ per cent of the salved value is not excessive and should not be disturbed. The circumstances might well have warranted more.

The claim that the salvors in this case should be compensated on a lighterage and towage basis is wholly untenable. It is preposterous as a bare business suggestion.

The Inter-Island Company are distinctly *not* in the towing business nor in the lighterage business; they are common carriers, and their vessels are not *tugs* looking for towing but are *freight and passenger steamers* which have regular schedules on which they operate in the inter-island trade, the very regularity of which is an important element of value to the company because every irregularity necessarily affects to some extent the convenience of the traveling and commercial public, and as necessarily entails some loss to the company. The Mauna Kea contributed a day out of her regular work, and which time would otherwise have been used to load her *freight* for her regular trip. She left only in time to take mail and passengers. It needs no specific evidence and no argument to show that her regular trade was seriously interrupted. It needs none

to conclude that the interruption caused loss to her owner, the Inter-Island Company. The same holds good for each and every vessel of the Inter-Island Company at the Celtic Chief. Abandonment of their regular runs amounted practically to deviation. It is perfectly safe to say that if the Inter-Island Company, or any company engaged in business as a common carrier of freight and passengers, were asked that its vessels, singly or collectively, should temporarily suspend regular business and come out merely to *tow* on any object, afloat or ashore, including even a stranded vessel, or perform lightering operations, on the understanding or suggestion that it would be regarded as a towing or lightering service and that compensation would be made on such a basis, it would not for a moment be considered as common business. There would be *no inducement*. The Inter-Island Company, in having voluntarily gone to the relief of the distressed vessel, and in having done it instantly, ready to take risks, and taking them, going with its vessels into a place where a master would imperil his license if he dared go there under ordinary conditions, to the abandonment of its own interests and business and the detriment of the public interest in the regular operation of common carrier vessels, did so on no towing or lightering basis. It did so on no conception that its vessels would be classed as "tugs" which have found employment. Its offer of relief was eagerly accepted,—the Ship's captain said he "wanted all the help he could get." Mr. Kennedy did not talk terms nor were terms suggested. Neither in the case of the Inter-Island or Intrepid was there any

employment; the case shows a mutual abandonment of the point of compensation to later agreement or adjustment, each presumably being conscious that it could ultimately be settled in a court of salvage if not otherwise. To this ultimate adjustment the case has come. It is submitted that this Court will apply to the case *such principles, based on the circumstances shown by the evidence, as will encourage rather than discourage relief of stranded vessels.*

It is argued that this particular vessel was in no particular danger and *therefore* the service was mere towing and lightering. We ask, did the parties so regard it at the time? Did it *promise* at the time to be only a case of time and labor? Was the item of danger to the Ship and cargo not at all in their minds? Was it not a *fear*, and a very grave one at the least, that she *might be lost if not gotten off quickly?* Is not promptitude to *prevent* danger or injury one of the prime factors of merit in salvage?

Salvage is not to be gauged or rewarded in the light of subsequent events but in view of the facts which seem to surround it at the time. See the case of *The Lowthier Castle*, 195 Fed. Rep. 604, and the many cases there cited,—which case is also instructive on the point of the distinction between “towage” and “salvage” service. If the standard for fixing compensation for assistance is to be determined largely by “*quantum meruit*,” or from the standpoint of *business*, after the dangers have passed or later appear to have been possible only, or that possible storms did *not* arise, then is not the danger great that owners of vessels may say,

to an inquiry for "towage" on a stranded ship, "Oh, yes, I'll help you as soon as I can, of course, but if, as you say, you are in no danger just now, I can't afford to go out right away—just you wait until next week; you may be going farther in, but then you say also you are resting easily in a nice comfortable bed of "soft" coral, and you aren't leaking just yet, and no storm hangs over you today, and my vessels are busy just now, and you only want to pay for towing and lightering, or will claim that's all I should be paid for anyway."

The purpose of salvage would not be served unless persons able so to do will feel encouraged to cast aside personal interest and go *at once* to the relief of distressed vessels, and render strenuous and unremitting service, in the confidence that they will get a square deal and a fair reward.

It must not be that services for the benefit of vessels in distress, are to become viewed with disfavor because of fear that they will not *pay*, until owners of vessels will hesitate to engage in such questionable ventures and risk loss, and which may come to mean, as of course, that a libel must be filed, and the burden of proof borne every step of the way, with an appeal to be contemplated whatever the award, and the almost even chance of ultimate positive loss as a net result of the litigation, expense, delay, harrassment of the trial (including time of witnesses taken from service on board to go to court), and actual immediate loss by cash outlay and loss and damage of materials, etc., besides the initial and subsequent prejudice to regular

business—all to be suffered and even expected as usually incident to an undertaking of salvage.

As to citations of particular cases of salvage awards, as a guide to determine an award in any special case, we think the difficulty lies in the fact that the cases are usually different. Awards on a percentage basis have obtained, and again have been as frequently considered inapplicable. The books are full of cases showing awards from two or three per cent up to fifty.

In the interests of commerce and navigation salvage awards ought to go beyond mere payment for work and labor.

2 Parsons on Shipping & Admiralty, 292.

When *passenger steamers* engage in salvage service they should be favored, as it occasions interruption of carriage of passengers, freight and mail. Ib. 299. Also the case of *The Strathnevis*, 76 Fed. 867.

We cite also the cases:

The Thornley, 98 Fed. 735 (20%);

The Annie Leland, 1 Fed. Cas. No. 421, p. 978 (over 10%);

The Lyman M. Law, 122 Fed. 816 (33⅓%);

The Howard, Fed. Case No. 6,752a (25%);

Edith L. Allen, 122 Fed. 729 (27%);

The Ellen Hood, Fed. Case No. 4,377 (11%);

Spreckels v. Dunreggan, 1 Estee (Hawaii) 19 12.8%);

The Penobscot, 103 Fed. 205 (17%);

The Minnie E. Kelton, 181 Fed. 237 (16⅔%),

although the danger was slight and the work unskillful;

The Fair Oaks, 205, Fed. 192 (15%);
The Henry B. Tilton, 214 Fed. 167 (35%).

Being in the position of having to prepare our brief without being able to see appellant's brief, or know his citations of cases, or argument—a situation which has confronted us throughout in presenting our case in this brief, which, otherwise, would doubtless be far shorter—we can do little more than discuss Libellee's citations heretofore made.

In the case at bar the services of the Matson tug and the Inter-Island steamers were volunteered and accepted. The service was not sought or engaged in any contractual sense, nor in the sense of an employment of them by the stranded vessel.

The Intrepid was not sought but went out immediately on seeing the ship ashore, and asked if assistance was wanted. The hasty discussion that took place as to "price" was not one for employment to *tow*, but was with respect to an understanding to "tow us *off*." As a bargain, had it been made, it would have meant no success, no pay. It was not a *quantum meruit* arrangement. It was not a hold-up. The spirit of McAllister was not one of greed; he went out to offer help and was only responding to Captain Henry's own attitude in discussing pay at all; Henry *asked* for an "offer." McAllister, not Henry, was the first to say "leave it and we will settle it ashore," and during the *whole time* he paused not an instant in bringing the tug into position to pass the line, and passed it, and began towing immediately.

Appellant has heretofore relied much on the case of the "*Hesper*" (18 Fed. 696), as one of parity, so much so as to make it clear that the case was a model for calculations of what was urged should be awarded to the Inter-Island Company in this case, on a basis of "towage and lighterage" to begin with, and being an allowance (in lieu of figures appearing in the case) of what was claimed would be fair to say the Inter-Island Company could have earned, net, on the value of their vessels engaged. For this the figure \$4,379.77 was submitted. As to this case we have to say: First, the towage and lighterage basis is not applicable; second, the calculations left the Inter-Island Company to pay its regular operating expenses of its vessels out of the "net" profits; and third, the arithmetic was faulty, as, if we were to follow the method used in the *Hesper* case, the award would be \$42,240 instead of \$4,379.77. These points we present as follows:

(a) "Towing and lighterage" as a basis of award: In the case of the *Hesper* the salving agencies were a tug and a lighter, the combined value of which was \$35,000. The libellants were *in the towing business as a business*, and, in the words of the Court, "the libellants' tug only went out when called upon and employed to do so. The labor and skill furnished were of the ordinary kind, such as libellants' boats were seeking as ordinary employment." (p. 699.) The Court considered that the libellants had there merely found employment in their regular business, employment for

which they were waiting, and without which they were idle.

(b) In the absence of evidence showing a basis of ordinary charges for towing and lightering or for the rental value of the Inter-Island vessels for the period of time covered by their services, it is not fair to assume that the allowance of the expenses plus a "liberal net earning" upon the value of the vessels engaged, would be a fair award. Allowance must be made for operating expenses. The Inter-Island Co.'s vessels cost a good deal to operate, whether on this service or in their regular service. The regular pay rolls of the crews, the fuel and supplies ordinarily consumed, the taxes and depreciation, the profit and loss account of the general business, the maintenance of all of the wharves, buildings, improvements, shops, machinery, office and shore employees of the business as a whole—and many items too numerous to mention, are all charged against the operating expenses of the Company, and, if the business is to pay, each vessel must earn not only its own operating expenses but a certain proportion of the general business expense of the Company before a dollar can be credited to "*net earnings*." If the assumption of a fixed per cent as *net earnings* has any meaning at all, it means earnings after expenses are paid. In this case we offered evidence only of the *extraordinary* and not the ordinary expenses of the Inter-Island Company in connection with the Celtic Chief. Ordinary expenses are assumed to be covered by the general award. These extra expenses cover the overtime wages

of men on the regular payroll, and wages of extra men employed, the money actually paid out, and the value of extra fuel and extra materials used, depreciated, lost or destroyed in the operations. These made the total of \$3,561.77 and were satisfactorily proved (3372).

(c) The case of the *Hesper* as a model for calculation: Even were we to pass the very material differences between the cases, the method used in the *Hesper* case, correctly applied to the case at bar, would show more material awards for the Inter-Island and Matson Companies.

In the *Hesper* case the Court considered that the tugs could be rated as able to earn as much as \$300 a *day*—and that, too, only on “*some* days” (694), and it was a *profit* (694) over expenses. As much was allowed for night work. The *Estelle* was engaged three days and one night (which the Court took as equivalent to four days) and the *Buckthorn* was engaged two days and one night (which the Court considered as equal to three days), or a total of seven days. Seven days at \$300 a day made \$2,100, which the Court considered should be doubled to make a fair basis for compensation in view of the nature of the services actually rendered by the salvors in that case, and therefore the award was \$4,200.

In the *Hesper* case, with \$35,000, as the combined value of the vessels, the Court’s allowance of \$300 was for one *day*—not one year—and that was a little short of 1% of their value.

The Intrepid is admitted as worth \$30,000. Reducing her $2\frac{1}{2}$ days and two nights to "days" we would have $4\frac{1}{2}$ days, or the use of \$135,000 for one day. Two per cent would be \$2,700, which, doubled, would make \$5,400.

The trial court found that the highest value the Inter-Island Company alone had at any one time was \$465,000, and the lowest \$240,000. An average of this ought to be fair, at \$352,000. Two per cent on this value would be \$7,040, the allowance for *one day*, not one year; and as there were three days and three nights (nights having been counted in the Hesper case as additional days) there would be six such "days." Even at three days (aside from nights) we would have \$21,120 for the Inter-Island. If we were to count also the three nights as days, as in the Hesper case, it would make \$42,240.

Therefore, even considering the original claims for salvage, the Inter-Island Co. \$35,000, and the Intrepid \$15,000, and considering also that the Intrepid doubtless saved the Ship in the first instance, and the fact that in the Hesper case the service although considered "of the lowest order" was rewarded by "double compensation on a basis of towage and lightering service," which basis applied to the case at bar, would thus allow \$21,120 (if not \$42,240), for the Inter-Island and \$5,400 for the Intrepid, how can it be held that the claims here were or are so exorbitant as to call for penalty of costs? There has been no showing of prejudice to the ship on account thereof.

When, in the *Manchuria* case (3 Hawaii, 150), the demand of the "Restorer" for salvage of \$300,000 was held "unwarrantable under the facts of the case," and costs were therefore only *divided* between the parties, the demand was *five times* the amount of the award; and the reason there given for the division of costs was that above quoted. In the case at bar, there seems to us ample evidence that the services rendered initially and immediately by the "Intrepid" were of very great value to the Ship and perhaps saved her from total loss, which, by all the evidence would have resulted *had* she once gotten broadside. The claim of the Inter-Island Company, originally for \$35,000, was not "unwarrantable" if, as we respectfully maintain upon the evidence, the Inter-Island Company was the principal salvor.

But the *Hesper* case is itself different from that of the *Celtic Chief* in other particulars: There the tug and lighter were applied for and employed; the bottom was sand; the value of the *Hesper* and cargo together was \$106,500; the value of the salving vessels only \$35,000; there was no peril to life or limb. In the case of the *Celtic Chief* there was volunteered service; the bottom was coral, not so "soft" that it does not make good building stone; the value of the *Celtic Chief*, cargo and freight was \$134,559; the value of the Inter-Island vessels averaged \$352,000; and the value of the *Intrepid* was \$30,000; and there *was* peril to life and limb as to the men manning the small boats.

In the "Manchuria" case, also heretofore cited by claimant, reported in 173 Fed. Rep. 28-46, the "Re-

storers" made a record clearly outlined by the Court as mercenary from start to finish,—the Court "took notice of the undisputed fact that the libellant was not a volunteer,"—her help was asked for, and answer delayed,—there was not even a tardy offer on her part,—upon written request for her services only did she * * * consent to render any assistance,—she would not even consent to get up steam without a guaranty for reimbursement for expense of so doing,—she kept a careful record of every thing of value in determining salvage,—etc.

Appellant sought to bring the present case under the terms of the "Manchuria" case based upon such attitude of the "Restorer," saying, in effect, that the Inter-Island Company were carefully preparing to sustain their exorbitant demand even before the ship was free, and seemed more interested in making a strong case for the Inter-Island than in aiding the unfortunate ship; and that their directors and their attorney were there to get evidence. All this seems to rest upon Mr. Lewis' assent to the question whether he had not gone out that night "as the attorney" of the Company, and his assent to the question of whether he was not thus there to "prepare himself for a possible suit" (Tr., p. 3233).

Mr. Kennedy's testimony cannot be read without it being seen that he had no such thought as gathering data for a suit. He "wasn't so much interested in lines" as he was "in seeing her move again" (Tr., p. 809). Taken as a whole his testimony sadly lacks the precision of times, distances, etc., that would be expected of a man

who went to "gather evidence." Mr. Dowsett "went out to the ship to see what was doing" (Tr., p. 2087). Mr. Lewis went there, being attorney for the Company, but even on his assent to the suggestion that he was there in that capacity, we submit it cannot be said that anything *he* could have seen or done that night could have affected the operations that were under way and which would have been the same with or without his knowledge, in which he had no part, and was neither asked for advice, offered none, and as only a *spectator*. It was not unnatural for him to have answered the question affirmatively, put as it was.

It has also been urged that the *Loch Garve* case furnishes the standard or control over the case at bar. The decision of the District Court is reported in 3 U. S. Dist. Court Hawaii, page 372, modified on appeal to this Court as reported in 182 Fed. Rep. 519. Let us compare the cases. Our page references will be to 182 Fed. Rep. unless otherwise indicated.

Values: *Loch Garve*, and cargo, etc., \$150,000 (Tr., p. 520); *Celtic Chief*, and cargo, etc., \$134,600.

Values of Libellants, aggregate: *Loch Garve*, \$430,000 (Tr., p. 520); *Celtic Chief*, \$565,000 (Tr., p. 3372); (Add *Intrepid* \$30,000 in each case).

Values of Libellants, pulling at time of success: *Loch Garve*, *Likelike*, \$100,000 (Tr., p. 3372); *Intrepid* (\$30,000) (Tr., p. 520, 3221). Total, \$130,000.

Celtic Chief, *Inter-Island*, \$240,000 (Tr., p. 3372); *Intrepid*, \$30,000 (Tr., p. 3221). Total, \$270,000.

Vessel ashore: Loch Garve, 128 feet, with bows lifted 2 feet 7 inches above floating draft (Tr., p. 520).

Celtic Chief, full length (this brief, p. 30), which was 266 feet (Tr., p. 3372), with her bow lifted 4.10 feet and her stern 2 feet above her floating draft, because she drew 20 feet 10 inches forward and 21 feet aft when she left Hamburg (Henry, Tr., p. 251), and by the testimony of Schroeder the depth of water "aft, amidships and in the forepart, 19, 18 and 16 feet of water respectively" (Tr., p. 384).

The Loch Garve would *float* far sooner.

The reef: Must have *been* "soft" in the Loch Garve case, as she was imbedded "to a depth varying from 1 foot 9 inches abaft amidships to 7 feet 6 inches off her forehatch," etc. (Tr., p. 520), while in the Celtic Chief case the reef was hard coral and rocks (see pages 7 and 18-19 of this brief), and her keel only, was imbedded, from 6 inches (Macaulay, Tr., p. 2345, 2389), to 8 or 12 inches (Miller, Tr., pp. 1618-19).

The Ship *would* have bilged on such a reef, once broadside.

In the Celtic Chief case, the Mauna Kea did not abandon, but let go only on passing her line to the Helene (Tr., pp. 2889, 2771-2), and saving "whatever good results she may have accomplished," while in the Loch Garve case the Mauna Loa was discounted because she failed to do so. (See 3 U. S. Dist. Ct. Haw. 378).

Weather and Sea:

Loch Garve: Although the weather was, on Wednesday night rainy with variable winds, it does not appear that this affected the vessel in the least, and this Court found that "the weather was good during Thursday and the sea smooth" (Tr., p. 524).

Celtic Chief: The swells affected the Ship and made the small boat lightering both difficult and dangerous. The state of the weather is reviewed on pages 8-10 of this brief, and the violent effect of the sea on the Ship, early in her stranding, is found by the Court (Tr., pp. 3370-1).

It has heretofore been urged by the Libellee that the claims of the salvors were "so exorbitant that they destroyed all chance of a settlement without litigation." This we deem a remarkable claim if it is to go outside of the record to intimate that no opportunity for a fair compromise was open to the Libellant before the *trial*, at least as far as the Inter-Island and Matson Companies are concerned. There is nothing *in* the record to justify the assertion. The trial court's opinion that the aggregate of all the claims, \$70,000, was excessive (Tr., p. 3375), is not, we submit, a fair basis for the penalty of costs therefore imposed upon all of the libellants, because it is not the fault of the Inter-Island Company, claiming as the principal salvor, that *another* libellant, the Miller Salvage Company, also so claiming, asks \$20,000. Why should the claims be added? No \$70,000 is claimed by the Inter-Island. Its claim, originally for \$35,000, but voluntarily reduced to \$25,-

000, should rather be considered from the standpoint of whether, were it the principal salvor,—as we submit the record shows was the fact,—the sum was too high, and justified such a penalty, when the trial court has itself found the salving of the vessel was *worth* \$30,000.

The claim of the Intrepid, originally for \$15,000, but reduced to \$10,000, is scarcely in a different position, for there is ample room in the case to say that it *cannot be said* that the work of the Intrepid, in the first vital hours, did not save the day.

It is respectfully submitted that the penalty of costs to *all* the salvors was not and is not merited.

Furthermore, as Miller's lightering was 246 long tons (Tr., p. 1201), which Watkins says was itself worth \$12,162 landed (Tr., p. 1202), and this was admittedly done by him under a lightering contract (Tr., p. 1667), his compensation on that part of his work should *not* be on a salvage but a contract basis. Eight thousand dollars was and is too much for him out of the entire award. More credit should be taken from him and given to the others. If we assume that his contract lightering resulted in landing \$12,161 worth of fertilizer, and he were allowed even 20 per cent of its value for his contract reward (this being even more than the salvage rate allowed by the trial court in this case), his compensation for *that* would be only \$2,432. Certainly the evidence in the case cannot warrant his being allowed \$5,568 *more* for the assistance of his anchor,—almost a *third* of the allowance for the Inter-Island for

lightering more cargo than he did, 365 long tons (Tr., p. 1203), by dangerous small boat work, and being the principal factor in saving the remaining 1,936 tons on board besides the spirits, marbles, and the Ship itself, the aggregate value of which, over the \$12,161 worth of cargo lightered by Miller, was \$122,438. Plainly, we submit, more belongs to the Inter-Island out of Miller's award of \$8,000. It would certainly be unfair, to *reduce* the awards actually made to the Inter-Island and Matson Companies, even if more cannot be allowed.

In the *Loch Garve* case this Court held that the Manning was mainly instrumental in floating the Ship, deeming that "whatever strain they (the *Likelike* and *Intrepid*), had no doubt contributed to that end" (Tr., pp. 524, 525), and *on that view* allowed the Inter-Island \$12,500 instead of the \$15,000 awarded by the lower court, and did not disturb the award of \$4,000 for the *Intrepid*.

In the *Celtic Chief* case the principal work was done by the Inter-Island Company, and the *Intrepid*, and the awards of \$17,500 and \$4000 are in fact too small by analogy.

In the *Loch Garve* case, the award to the Inter-Island Company was \$15,000 and costs. It was afterwards reduced to \$12,500 on the ground that the court below had not given sufficient credit to the work of the "Manning." The action of the appellate court amounted to a finding, not that the work would not have been worth the \$15,000 had the Inter-Island Company done

it all, but that, on that basis, part should have been credited to another agency. In the case at bar we submit that our arguments and the evidence show clearly that the "Arcona" cannot come in as a salving factor, to have "credit" set apart to it in reduction of the amount which the Inter-Island Company or Matson Navigation Company should receive.

Furthermore, let us look at the separate awards actually awarded by the trial court to the Intrepid and Inter-Island, aside from interest. The entire award of \$30,000 included interest in the sum of \$5,220. This interest is itself $17\frac{1}{2}\%$ of the \$30,000. Therefore, of the award of \$17,500 to the Inter-Island, $17\frac{1}{2}\%$, or \$3,062, goes for interest, leaving the actual *salvage* award \$14,438. Similarly, of the award of \$4,000 to the Intrepid, $17\frac{1}{2}\%$, or \$700, stands for interest, showing the actual *salvage* award as \$3,300.

As to the Inter-Island, \$14,488 is approximately $10\frac{3}{4}\%$ of the value salved.

As to the Intrepid, \$3,300 is a little less than $13\frac{1}{5}\%$ of the value salved.

Taking the Inter-Island \$14,488 and Intrepid \$3,300 together, or \$17,788, this would be $13\frac{1}{5}\%$ of the salved value.

As also affecting the amount of the award should be considered the fact of the Likelike's care of the Ship when cast off by the fearsome cruiser under the conditions heretofore shown, and the later mere towage serv-

ice by the "Maui" in taking the vessel into the harbor next morning,—all as yet uncompensated.

The separate allowance of the \$3,561.77, clearly proved and found by the Court to have been actual loss and outlay, should also stand. Such allowances have heretofore been made (see *The British Queen*, 89 Fed. Rep. 1002; *The Henry B. Tilton*, 214 Fed. 167; and *The Fair Oaks*, 205 Fed. 192, 195, where deposition expense and attorney's fee was allowed).

NOTES IN REPLY.

In order that some points may not be passed without notice, where we deem that corrections or comments should be made by way of reply to appellant's brief, we make the following supplement to our brief.

The Mauna Kea, not the Mikahala, was the first Inter-Island vessel to reach the Ship. In this counsel have, on page 6 of their brief, followed the clear error of the trial court appearing on Tr., p. 3352.

The time of the transfer of the line from the Mauna Kea to the Helene was 7 a. m., not 8 a. m. (Tr., pp. 2889, 2771-2); and here again the equally clear error of the trial court (Tr., p. 3353), has seemingly been merely followed by appellant (Brief, p. 6). There is *no* testimony which gives the Mauna Kea as arriving except at 6:30 or 7:00 a. m.; nor did the Mauna Kea leave until her line was transferred while pulling.

The Likelike came out, not at noon (Brief, p. 7), but in time to have her anchor laid and line passed by noon (Tr., p. 3354).

The suggestion of "salvage under legal advice" (Brief, p. 8), is not warranted, and the facts show that Lewis, Kennedy, Dowsett and Wilcox went out merely as spectators. Kennedy himself had understood that there had been a "program" for the Mikahala, but it was not within his own knowledge (Tr., p. 807). He said himself that he was not so much interested in lines then as in *seeing her move* again (Tr., p. 809). No more does it appear that Lewis knew anything of the plans, or that he ever opened his mouth except to comment on what he observed. Dowsett went to "see what was doing" (Tr., p. 2087). It is not likely that any of these men, if actively interested in the operations, would have gone to bed and asked only to be called later (Tr., pp. 761, 773, 2092, 3224). Merely being there to observe, does not affect what was independently done by others than the observers.

It would be more correct, as we contend, to say that the Arcona's *stern* was astern of the Ship, rather than that her *position* was astern (Brief, p. 10). Her *bow* was inclined eastward.

To the claim that the Inter-Island and Miller Salvage Company witnesses all "absolutely discredited all aid but their own" (Brief pp. 12-13), we think the same is quite as true of the witnesses from the cruiser. Henry did not hesitate to belittle practically all but the Arcona; and we do not regard the claimant as any less "interested" than the libellants, and as to the Arcona officers we think their depositions justify a belief that militarism or egotism, and clear scorn of the "three

little tugs," prevented their feeling "disinterested" on the point of who rendered the most effectual service.

Not only was the lightering effective to aid the Ship (Brief, p. 14), but the *holding* of her, while lightering.

Referring to the foot note on page 51 of Appellant's brief, we cite also the witness Mason's own admission, upon cross-examination, that he had not heard Macaulay say anything of the kind (Tr., pp. 940, 999).

Much of the force of Appellant's citations of cases: *The Howard* (Brief, p. 55); *Roberts vs. The St. James*, and *The Katie Collins* (Brief, p. 58); and *The Diadem* (Brief, p. 59), and also the argument of what "might well have happened" (Brief, pp. 60-61)—applies, we think, to the attitude of the Arcona in this case.

And the argument itself emphasizes the possibilities of danger in this case.

We refer now to appellant's brief, pages 61-64, and also pages 4 and 5, as to the service first rendered by the Intrepid; and point out that the Ship was then *touching* and was *not* hard aground, but, as found by the Court, was then "always moving gradually toward broadside" (Tr., p. 3352); and the quotation of testimony on page 62 of Appellant's brief should be supplemented by the testimony on Tr., pp. 2195-99.

Referring to Appellant's brief, page 64: The Intrepid was *not* dismissed, for Capt. Henry accepted McAllister's offer still to lay within hailing distance, to respond if wanted (Tr., pp. 86, 95-96).

To the point urged by the Appellant that the Intrepid's share of the award should be forfeited because

of the misconduct alleged, we reply that it is clear, even upon Appellant's own estimate of the alleged misconduct, that it was not any misconduct or fault on the part of the owners of the *Intrepid* but was wholly individual and personal on the part of the Master, McAllister. Misconduct of a master or crew, without fault on the part of the owner of a vessel which has rendered a real and substantial salvage service, does not work any forfeiture as against such owner. See the cases:

The Rising Sun, 20 Fed. Case No. 11,858;

The Mulhouse, 17 Fed. Case No. 9,910;

The Boston, 3 Fed. Case No. 1,673.

And the Court did penalize the Master of the *Intrepid* (Tr., p. 3373).

As respects both the *Intrepid* and the *Mauna Kea*, which were not engaged during the whole operations, it is submitted that they, having rendered valuable services which contributed to eventual success, are not in the class of salvors who have merely made unsuccessful efforts.

The Gov. Ames, 108 Fed. Rep. 969, 972;

The Flottbek, 112 Fed. Rep. 682, 685.

Appellant's cases (Brief, pp. 87, 66), cited to support the contrary claim, are not in point. The *Mauna Kea* did not leave except upon transferring her line to the *Helene*, as elsewhere shown.

May we say that the word "they" at the end of line 13 should be "it," and have for its antecedent only the Miller Company.

There being no evidence of what strain, if any whatever, was put on the Arcona anchor, the fact that the anchor "held fast" (Brief, p. 94), does not establish its holding power. The credit given by the Court to the Helene's holding power (referred to in Appellant's Brief, pp. 94-95), was mainly before the Arcona came out.

The argument that the Court should here consider, in any case, the services which the Arcona *could* have performed "if necessary" (Brief, p. 99), prompts the reply that her help was sought at first and her commander used his own judgment, against that of those requesting the aid, as to when it was "necessary."

We urge that not only should the awards to the Inter-Island and Matson Companies not be reduced but they should receive more, by a proportional readjustment and allowance to them of at least one-half of the \$8,000 award to the Miller Salvage Company; and, further, that the penalty of costs against these libellants should be remitted.

Respectfully submitted,

W. O. SMITH,
L. J. WARREN,
CHARLES P. EELLS,
W. H. ORRICK,

*Proctors for Inter-Island Steam Navigation
Company, Ltd., and Matson Navigation
Company.*